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No. 06- 06-635

IN THE

Supreme Court of the United States

ED H. SMITH, *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For several decades a group of mostly white aldermen, having a slim majority, has ensured control of the Chicago City Council by voting as a bloc. That white majority has hired private attorneys to bring, defend, or voluntarily join a series of seven lawsuits in the 1980s and 1990s contesting control, and ensured these attorneys were subsidized by City funds under the exclusive control of its leader, as Chairman of the Council's Finance Committee. He refused any subsidy to the mostly African American political opposition, unless they capitulated and joined his side. Because of racial polarization in popular and Council voting, political and racial motives are inextricably mixed.

Plaintiff African American aldermen brought this lawsuit to bring this practice of subsidizing just the white bloc to an end. The district court after full trial held that the pattern of City subsidies to just the white aldermen for private attorneys violated the Constitution, but a 7th Circuit panel reversed, in an opinion which disregarded the fact this case involves race and applied the same highly deferential "lenient" standard of "rational basis" to decisions by top municipal officials who discriminate along racial/political lines against their racial/political opponents as would apply if the municipality or state had passed a piece of economic legislation – any hypothesized or suggested rationale will do. This approach conflicts with this Court's decisions in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) (look to historical patterns, factual context to determine if impermissible motive a factor in decision), *Romer v. Evans*, 517 U.S. 620 (1996) ("legitimacy" of public purpose carefully scrutinized where evidence of bias), and *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) ("exacting scrutiny" where 1st Amendment interests). It improperly shifted to Plaintiffs the burden to negative all "conceivable" grounds in conflict with this Court's decision in *Mt. Healthy City Board v Doyle*,

429 U.S. 274(1977), which placed the burden on the City to show a factually credible independent basis for denial, a showing it can not make as the district court found.

If a white legislative majority, seeking to maintain control, can use tax monies to subsidize just itself, why can any state or Congress not subsidize Democrats and not Republicans, or whites and not blacks. No one has a right to public subsidy, but if government creates a subsidy, it cannot attach unconstitutional conditions or discriminate along racial or other impermissible lines. Here the City did both – no subsidy if you are African American and no subsidy unless you vote with the white bloc. The 7th Circuit decision approving this utilized standards at odds with the settled law of this Court.

The following questions are raised:

1. Where a city discriminates in the dispensing of public funds in favor of its white aldermanic bloc and against its African American aldermen to ensure white bloc control, is this considered a "suspect" decision requiring heightened scrutiny under the Equal Protection Clause, or does the most lenient "rational basis" standard for economic legislation apply?

2. In analyzing whether a municipality's proffered purpose for discrimination is "legitimate", did the 7th Circuit depart from this Court's settled law (see, e.g., *Arlington Heights*) and the law in other Circuits by equating "facial" and "as applied" cases and refusing to consider the rationale in its factual context — inter alia, the municipality's failure to follow local law, its historical pattern of similar discrimination, use of pretextual cover stories, and departures from normal procedures?

3. Under the First Amendment, does the targeting of the elected African American political opposition by the white majority for discriminatory treatment in the dispensing of public funds, to maintain control, threaten protected expression and require "exacting scrutiny" of proffered excuses and testing of their legitimacy against the facts?

LIST OF PARTIES

Ed H. Smith, Allan Streeter, Dorothy Tillman, Helen Schiller, John O. Steele, Lawrence S. Bloom, Robert Shaw, Jesse J. Evans, Bobby L. Rush, Percy Giles, William M. Beavers. Toni Preckwinkle, Rickey Hendon, Joe Moore, Arenda Troutman, Shirley A. Coleman, Virgil E. Jones, Jesse Miller, Sam Burrell, Dexter Watson, Madeline Haithcock, Jesus Garcia, Ricardo Munoz. There are no corporate parties.

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The opinion of the 7th Circuit Court of Appeals is reported at *Smith et al. v. City of Chicago*, 457 F.3d 643 (2006). This reversed the district court's opinion, *Smith et al v. City of Chicago*, 2004 WL 1300180 (prejudgment interest added 2004 WL 2452740). The previous district court's summary judgment ruling is *Smith v. City of Chicago*, 2002 WL 1770532. See Appendix A- E.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

The Seventh Circuit's opinion was rendered August 7, 2006 and this petition is filed within 90 days thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

Amendments to the Constitution of the United States of America

> Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right

of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. OVERVIEW

This case was brought by Chicago's African American aldermen to stop a practice engaged in by its white aldermen, who have formed a slim majority bloc, of using City funds to subsidize private attorneys just for themselves in a series of seven racially divided lawsuits throughout the 1980s and 1990s in which control of the City Council was at stake.[1] This case directly involves two suits brought after the 1990 remapping of the City's wards that complained of its racial bias. In the first, *Barnett v. City*, African American voters sued the City and all 50 Chicago aldermen.[2] The African Americans and the white bloc retained separate private attorneys, and the leader of the white bloc ensured that only its attorneys were paid by the City. In the second, *Smith v. City*, the African American aldermen sued the City for bias in the remap, the white bloc voluntarily intervened with private attorneys, and again ensured that only their attorneys were paid by the City.[3] When asked to explain these actions, the leader of the white bloc told a transparent lie. This suit followed, seeking to end the discriminatory practice.

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1. The 23 Plaintiffs include several white aldermen from majority minority wards who are not part of the white bloc. The white bloc includes several non-white aldermen.

2. The City by law and in all cases was represented by its Corporation Counsel's office.

3. These two suits were later consolidated under the caption *Barnett v. City of Chicago*.

This most recent discrimination by the City did not occur in a vacuum. After each of the 1980 and 1990 censuses, the white bloc drew ward boundaries (later held illegal under the Voting Rights Act) so as to create enough majority white wards to maintain control. The white bloc then used unlimited public funds (in the most recent case over $16 million) to employ private law firms to represent its members to bring suits seeking to maintain control through Council rule changes (*Roti I* and *Roti II*) and counter any lawsuits challenging the discriminatory ward lines (*Ketchum*, *PACI* and *Ramos*).[4] Chicago voting is racially polarized. Majority white wards elect white aldermen who vote as a bloc, and African American wards tend to elect African Americans who tend to vote independently. Therefore the purpose of the discrimination in subsidy to the white bloc was inevitably both political (viewpoint) and racial – to reduce African American voting power in the City Council to ensure white bloc control.

Having a majority which voted as a bloc allowed the white aldermen to pass or block whatever legislation they pleased, regardless of the African Americans. But maintaining their slim majority depended, after each census, on drawing ward boundaries which created enough majority white wards, and then "stacking the deck" in any subsequent litigation by intervening and using unlimited public funds under their control to hire private attorneys to represent their interest in defending the racial bias in the lines drawn. After the 1980 remap was held illegal in 1985 under the Voting Rights Act, resulting in new elections in seven wards which caused the white bloc temporarily to lose control (1987-89), the white bloc changed tactics.[5] After the 1990 remap, they opened up the public coffers

4. *Roti I* was in 1983, *Ketchum* was decided in 1985, *Roti II* was decided in 1986, and *PACI* and *Ramos* were in 1990. See details, *post*.

5. In 1983 the City elected its first African American mayor, Harold Washington, changing the white bloc from supporting the mayor to opposing it, as it did in *Roti I* and *Roti II*. Upon his death and a brief interim successor, in 1989 a white mayor was again elected and thereafter the white bloc has supported the mayor.

(ultimately over $16 million) for a prolonged "scorched earth" litigation consuming the entire decade. Thus their control was ensured to the next census *regardless* of the validity of the map (which was ultimately held illegal). *All* of these efforts by the white bloc, in the seven cases throughout the two decades, were funded by large amounts of public dollars under the exclusive control of their leader, Alderman Burke, as Chairman of the City Council Finance Committee.

Whether the white aldermen opposed and sued the City (*Roti I* and *Roti II*) or intervened along with it to protect their interests (*Ketchum*, *PACI*, *Ramos & Smith I*), Alderman Burke always made sure their private attorneys were paid with public funds under his control. He had at least 8 separate City accounts from which he could draw for this purpose (Appendix E at 99a-100a). Whenever the African American aldermen requested similar subsidy, even as co-defendants with the white bloc in *Barnett*, they received nothing.

In this case the African American aldermen seek to stop the discrimination in subsidy afforded the white bloc, specifically complaining about the two most recent white bloc subsidies in the suits testing the 1990 remap, *Barnett* and *Smith I* (subsequently consolidated). The African American aldermen demanded equal treatment among all aldermen – that no aldermen be publicly supported or all of them – so there would be a "level playing field", and because all aldermen had the same interest in the cases. The African American aldermen pointed out that they were defendants in *Barnett* and plaintiffs in *Smith I*, and got no subsidy in either, while the white bloc was subsidized in both. They pointed out that although they were plaintiff in *Smith I* and opposed to the City, the white bloc aldermen were opposed to the City in the recent suits over City Council control in which Alderman Burke nonetheless subsidized his plaintiff white bloc. (*Roti I* and *Roti II*).

Pretending he was unaware of any source for funding except "to defend" (Municipal Ordinance 2-152-170), and suggesting that otherwise Plaintiffs would be entitled to funds, Alderman Burke denied Plaintiffs' request and pursued his "scorched earth" litigation effort to protect the white bloc interest in continued City Council control. The record is clear that his excuse was a knowing pretext; he continued (as in the prior cases) to use various other public accounts under his control which were not limited to "defense".

The district court after full trial held the City's actions in *Barnett* and *Smith I* were discriminatory, finding the City's huge subsidy to just its white aldermen inconsistent with the stated, or indeed any, legitimate rationale in light of its clear pattern of decisions, both previously and here.[6]

By disregarding the facts and treating the *Smith I* case in isolation, the 7th Circuit panel rejected this view, holding the City "was entitled to subsidize the litigating position of the aldermen who were defending the remap ordinance without also subsidizing the aldermen who sought to invalidate it." (Appendix A at 20a). It adopted the most "lenient" possible standard of "rational basis" review in the face of the fact this case involves race and First Amendment interests. It disregarded the non-payment in *Barnett* completely although it was consolidated with *Smith I*, and refused to consider the consistent pattern of subsidizing just the white aldermen as relevant at all. Instead, it treated the five prior cases as "ancient history" (despite the fact the decision maker (Burke) was the same in all cases, as were most of the aldermen, and the most recent prior cases – *PACI* and *Ramos* – were less than six months old).

The 7th Circuit effectively reverses this Court's settled law. In *Arlington Heights* (race) and *Mt Healthy School District v.*

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6. A prior district judge had dismissed on summary judgment Plaintiffs' separate race claim. Since Plaintiffs obtained all their requested relief from the district court judgment, this claim merged into the remaining equal protection claim, which the 7th Circuit decided.

Doyle, 429 U.S. 274 (1977) (First Amendment, burden shifts to defendant to prove independent non-infringing basis), this Court held that historical patterns are significant in "as applied" cases like here, and that racial or viewpoint distinctions in subsidies are "suspect". Moreover, both cases require testing the hypothetical rationale against the facts. If done, the lack of an independent basis for decision which does not infringe the First and 14th Amendments is clear as the district court held. The 7th Circuit also disregarded *Romer v. Evans* and accepted, without analysis, a rationale – the City was only supporting those who supported it – which (as discussed hereinafter) is utterly inadequate to explain the City actions, exposing invidious intent.[7]

B. SUMMARY OF UNCONTESTED FACTS[8]

1. Chicago's Racial Politics in Context

During the 1980's and 1990's, the Chicago City Council, consisting of 50 aldermen elected from 50 wards, was divided largely along racial lines. During most of this time, the white aldermen formed a bare majority and the African American aldermen a bare minority. This racial division mirrored a sharp political difference: the predominantly white aldermen voted as a cohesive bloc, either with the white mayor, or opposed to the African American mayor, while the predominantly African American aldermen voted independently of the mayor's wishes,

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7. The 7th Circuit opinion cavalierly dismissed Plaintiffs' case as "only a claim for unreimbursed attorneys' fees and related litigation expenses . . . dressed up in constitutional clothing." (Appendix A at 1a-2a) This confuses the remedy with the violation. As the district court held (Appendix C at 77a), Plaintiffs always sought equal treatment, not a subsidy – no funding for any alderman or funding for all.

8. This case is not really "fact intensive", since the 7th Circuit's disregard of the most relevant facts flowed from its misconception of this Court's settled law. Application of the correct legal standard makes the disregarded facts material. The case really turns on whether the 7th Circuit's "lenient" use of "rational basis" in this racial/political case is in conflict with this Court's decisions requiring "close scrutiny" and burden shifting under both Equal Protection and the First Amendment.

sometimes for, sometimes against. These differences were marked: according to a study entered into the record at trial, during the late 1980's and early 1990's (the early time of the current administration and the time of filing this lawsuit), the white aldermanic bloc voted with the white mayor 95% of the time, effectively guaranteeing control on all matters, while the African American aldermen voted with the mayor 45% of the time, almost a coin toss. Adding African American aldermen directly threatened loss of white bloc control.

Drawing ward boundaries favorable to the white incumbents was critical to continuance of the white aldermanic majority supporting the white mayor. This is because, as the above study shows, majority African American wards tend to elect African American aldermen (who vote independently) while majority white wards always elect white aldermen (who vote as a bloc). The drawing of the ward boundary map dictated whether the white bloc continued to control the City Council. As one African American alderman put it: "The map was everything. You really need to find some parity in the map." Conflict over this, and its implications on control of the City Council, arose after the 1980 and 1990 federal censuses, when by law new ward maps had to be drawn. Litigation ensued, in which the African American aldermen sought greater representation more in accord with their population and white aldermen sought to protect the advantage they had gained through the power of the majority to draw a map favorable to continued white bloc control.

2. The Lesson of 1987; Control the Ward Map and its Aftermath

Both the 1980 and 1990 ward "remap" suits resulted in findings that the ward maps drawn by the white aldermen and adopted by the City violated the federal Voting Rights Act by unduly limiting African American voting power. As a result of the 1980 remap suit (*Ketchum v. City Council*, 630 F. Supp. 551 (N.D. Ill. 1985)), 7 ward boundaries were redrawn and new

elections held in 1987, resulting in increased African American aldermen and a change in the City Council voting blocs from 29 white/21 minority to an even split – 25/25, with the mayor breaking the tie. Since at the time the mayor (Harold Washington) was African American, this resulted in the white bloc's loss of control in City Council voting, and also loss of Council committee chairmanships, including most significantly Burke's extremely powerful Finance Committee chair.[9]

Chastened by their temporary loss of power, the white aldermen reasserted themselves with the 1989 election victory by the current mayoral incumbent, Richard M. Daley, which once again brought them chairmanships and City Council control, which endures to this day. Alderman Ed Burke, who had been ousted in 1987 as Chairman of the Finance Committee, reassumed that post. One reason that role is very powerful is that by the terms of the Annual Appropriation Ordinance (the official name for the budget once enacted) the Finance Committee Chairman has exclusive control over the public funds in a number of broadly-worded accounts, which are reenacted every year, and by which he has authority to provide public funds for aldermen, including most pointedly the payment of legal fees (Appendix E at 99a).

3. The 1990 Census: Drawing a Ward Map Favoring the White Bloc

As a result of the 1990 census, new aldermanic ward boundaries had to be drawn. The Finance Committee Chairman and the white bloc were determined not to allow a repeat of the disaster they suffered in 1987–89 when they lost City Council control because they lost the remap suit (*Ketchum*). This time they opened full the public coffers in support of their litigation efforts. The first step was to draw a map by which enough white

9. In two lawsuits brought after the arrival of Harold Washington as mayor, the white bloc hired private attorneys and sued the City to maintain their ascendancy in City Council, and Alderman Burke caused the City to pay for these efforts (*Roti I* and *Roti II*). See, *post.*

aldermen would be elected. Next, rather than put it before the City Council, where debate might easily and publicly proceed, they decided to employ an alternative procedure under state law whereby competing maps could be put before the voters. Upon this vote, in which the white bloc's map naturally gained more votes than the African American bloc's map, the white bloc's map automatically became the official City ward district map. This occurred in March 1991.

4. The 1990 Ward Remap Aftermath: the *Barnett* and *Smith I* Cases

Two lawsuits were filed in 1991 challenging the white bloc's map after its adoption. In *Barnett v. Daley* (*Barnett*), several African American voters sued all 50 aldermen and the City under the Voting Rights Act, urging their own map. The aldermen were ultimately dismissed from the suit, leaving the City, represented by the Corporation Counsel. The aldermen in the white bloc, however, then voluntarily intervened, stating they needed to protect their separate interests. They were represented by private attorneys and fully funded with public funds both before the dismissal and after. The African American aldermen in *Barnett* requested the Finance Committee Chairman to pay their attorneys fees while they were also defendants in *Barnett* (like he was for his white bloc) but he refused.

The second suit was *Smith v. Daley* (*Smith I*), in which the African American aldermen (also Plaintiffs here) sued the City under the Voting Rights Act, urging their own map. The white bloc intervened voluntarily in *Smith I*, stating again that they had an interest in the ward map litigation as aldermen, that this interest was not the same as that of the City, and they needed to protect their separate interest through their own private counsel. Once again, the Finance Committee Chairman fully funded their private attorneys with public funds under his control. *Barnett* and *Smith I* were ultimately consolidated for trial and thereafter litigated together.

5. The Pretext Given for the Discrimination

The Finance Committee Chairman, upon being asked why he was supporting only his white bloc of aldermen in the 1991 remap suits, gave a clear and consistent answer, both in writing and under oath. Stating he would be happy to consider similar funding for the African American aldermen if they could point to any "authority" in the City's laws, he indicated he was aware of only one ordinance which applied to the public funding of lawsuits involving aldermen, and this ordinance applied only where a public official had suit "initiated against" him causing him "to defend" (2-152-170). The African American aldermen, as plaintiffs in *Smith I*, could not qualify.[10] He was silent as to why he refused to reimburse the African American aldermen in *Barnett*, where they were defendants along with the white bloc, and how he was able to fund his white bloc as voluntary intervenors in *Smith I* and as plaintiffs suing the City in *Roti I* and *Roti II*.

Were it true, as the Finance Committee Chairman claimed, that the suggested ordinance was the sole legal basis under City law for paying legal fees for aldermen, Plaintiffs' request (at least as to *Smith I*) would be asking him to violate City law, and might properly be denied. However, it was not true. The City's Annual Appropriations Ordinance contained numerous funding accounts, reenacted each year, providing for payments

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10. 2-152-170 covers all City officials and provides:

> "If any claim or action . . . is instituted against a current or former elected official, current or former appointed official or current or former employee of the city of Chicago . . . where such claim arises out of any act or omission, made in good faith, occurring within the scope of such person's office or employment, the chairman of the committee on finance of the city council, with the approval and concurrence of the mayor, may at the request of such person appoint counsel to defend such person against any such claim or action."

Relying on this ordinance was pretext here.

such as the African American aldermen requested, without any limitation to "defense" such as contained in the provision the Finance Committee Chairman relied upon.[11] The Chairman of the Finance Committee was responsible for the drafting and enactment of these various alternative provisions, as well as for the disbursement of money under them. His basis for denial to the African American aldermen was thus not only untrue, it was knowingly untrue.

Moreover, while professing ordinance 2-152-170 to be the only known source for funding aldermen in lawsuits, the Finance Committee Chairman *actually never used* this provision to fund his own white bloc in any of the seven relevant lawsuits during the 1980's and 1990's (discussed hereinafter), including *Barnett* and *Smith I*, always using one of the alternative provisions he alleged did not exist. These latter accounts were not limited to "defense" and in several of the prior cases (*Roti I* and *Roti II*) the white bloc were plaintiffs suing the City but were nonetheless reimbursed. Thus the Finance Committee Chairman's stated reason was a knowing pretext.

6. The Effectiveness of the White Bloc's Tactics

The white bloc's map was the official City map from 1991 until 1998 when the 7th Circuit Court of Appeals declared it illegal under the Voting Rights Act (*Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998), *on remand* 17 F. Supp.2d 753 (N.D.Ill. 1998)). From 1991 until 1998 the white aldermen, armed with private attorneys fully funded by the public monies made available by the Finance Committee Chairman, conducted the longest (8 year) and most expensive ($16 million) Voting Rights litigation in history, ensuring the white bloc's control over the City Council almost until the next decennial census in 2000. Thus although losing the merits, the white bloc's fully

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11. The record shows at least 8 such separate accounts totaling millions of dollars, reenacted each year. These are set out in Appendix E at 99a-100a.

funded, scorched earth exploitation of the law's delays achieved their ends.[12]

7. This Suit

In this suit, Plaintiffs, the African American aldermen, seek to stop this continuing discriminatory practice of using public funds to support the white bloc's intervention in and pursuit of litigation affecting City Council control, while refusing any such support to the African American aldermen even in the same litigation.[13] As the district court held, they do not seek a "subsidy" of their viewpoint, but rather equal and consistent application of City law (Appendix C at 77a) and the absence of invidious distinctions in disbursement of the City's subsidy.[14]

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12. The average Voting Rights case takes a week to try and lasts a year from filing to conclusion of all appeals. The short time is for obvious reasons: it is the government's interest to resolve upon a fair and legal map as expeditiously and inexpensively as possible to settle any questions of illegitimacy in its operations. No such concern was exhibited here. There were 51 trial days before two different judges, two merits appeals (*Barnett v. Daley*, 32 F.3d 1196 (7th Cir. 1994); *Barnett v. City*, 141 F.3d 699 (7th Cir. 1998)), one mandamus appeal (*In re Barnett*, 97 F.3d 181 (7th Cir. 1996) and a fee appeal (*Barnett v. City*, 3 Fed. Appx. 546 (7th Cir. 2001). The 7th Circuit opinion in 1998 remanding for a determination of illegality set a short time for hearing before a new judge and expressed frustration at the obviously excessive delay. The cost to the taxpayer for the white bloc's private attorneys alone averaged over $2 million dollars a year (total $16 million plus).

13. The African American aldermen were represented by two lawyers on contingency. 56 lawyers worked for the white bloc.

14. The district court's remedy here of $250,000 +/- was an equalizing amount for items that the City paid its white aldermen (largely expert witness fees), but the African American aldermen were unable to recover under fee reimbursement statutes. *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("mandate of equal treatment" required for violation of equal treatment).

C. THE 7TH CIRCUIT OPINION DISREGARDS SETTLED LAW

1. This is not Economic Legislation

The district court held the City's unequal subsidy practice was discriminatory. On appeal, the City conceded that it discriminated against the African American aldermen because they were opposed to the map drawn by the white bloc and, through the popular vote, adopted by the City. It thus concedes that its funding decisions targeted the racial/political opposition because of their opposition. The 7th Circuit held that this targeting and discrimination was "rational" and "legitimate" because the City was also defending the map properly adopted under state law, and could support anyone supporting its side. It held the broadest possible "rational basis" test applies to this case, just as though it involved a facial attack on economic legislation; any hypothetical suggested rationale will do.[15]

This approach conflicts with settled law. Targeting the racial/political opposition for discrimination in the use of public funds is illegitimate and improper under long-standing Equal Protection (*Arlington Heights)* and First Amendment (*Buckley v. Valeo*) standards.[16] And the City's suggested *post-hoc* rational basis, adopted by the 7th Circuit, is inconsistent with the facts (as shown hereinafter) and demonstrably illegitimate under *Romer* and *Mt Healthy*. Although no one has a right to public

15. A measure of the obtuseness of the 7th Circuit opinion is that in 23 pages it somehow never manages to mention that Plaintiffs are African American and the opposing majority, white.

16. The 7th Circuit's novel approach effectively reverses *Arlington Heights* and *Mt Healthy*. According to the 7th Circuit, a city's stated reasons may *support* rationality, but never *undermine* it. (Appendix A at 18a). In this case the City's suggested rationale, adopted by the 7th Circuit, surfaced via the City's attorney for the first time shortly before trial, twelve years after Alderman Burke's stated grounds for denial, and after discovery and depositions under oath. Although inconsistent with the facts, the 7th Circuit adopted this canard as truth.

subsidy, once the City decides to subsidize its white aldermen it could not put an invidious condition upon that subsidy, to wit, that you not be African American, or that you vote with the white bloc. Here the City did both.

2. The 7th Circuit Refused to Analyze "Legitimate Public Purpose"

In *Romer v. Evans*, 517 U.S. 620, 635 (1996), this Court invalidated a state constitutional amendment prohibiting legislation which protected the status of persons based upon their "homosexual, lesbian or bisexual orientation, conduct practices or relationships." Although the state offered up several rationales for the amendment, including its citizens' "freedom of association", this Court held that it could not "credit" them, and that the amendment raised the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." To be "rational", a state provision must "constitute a *legitimate* governmental interest", and the "bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (*Id.* at 634-35) (ital. in original).

Just as in *Romer*, the various suggested rationales offered up to justify the City action here and adopted by the 7th Circuit do not amount to a "legitimate" governmental purpose. By misinterpreting this Court's law, the 7th Circuit allowed itself to side-step facts (discussed hereinafter) that destroy the legitimacy of the proffered hypothetical purpose.

D. FACTS DISREGARDED UNDER THE 7TH CIRCUIT'S ERRONEOUS STANDARD UNDERMINE ITS HOLDING

The 7th Circuit Treated As Irrelevant Facts It Had To Consider

The 7th Circuit panel's statement that no one has a right to subsidy is incomplete. It omits that a government which decides to subsidize an activity can not create unconstitutional conditions or draw invidious lines in disbursement. *Perry v. Sindermann*,

408 U.S. 593, 597 (1971). Here the City of Chicago did both; it refused subsidy to the African Americans, and it refused it unless they voted with the white bloc. As this Court said in *Arlington Heights:*

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *The impact of the official action* – whether it "bears more heavily on one race than another," Washington v. Davis, supra, at 242 - may provide an important starting point. *Sometimes a clear pattern*, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. [cites] But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.
>
> "*The historical background of the decision* is one evidentiary source [of true intent], particularly if it reveals a series of official actions taken for invidious purposes. [cites] *The specific sequence of events leading up to the challenged decision* also may shed some light on the decisionmaker's purposes. . . . *Departures from the normal procedural sequence* also might afford evidence that improper purposes are playing a role. *Substantive departures* too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (italics added)
>
> "The *legislative or administrative history* may be highly relevant, especially where there are *contemporary statements by members of the decisionmaking body*, minutes of its meetings, or

> reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. [cites]"

Arlington Heights, 429 U.S. at 266-268 (emphasis supplied).

Plaintiffs presented facts satisfying each of the above factors. They are:

1) The City's denial, contrary to its own law, of any support to the African American aldermen in *Barnett* when they plainly qualified for it under the very ordinance Burke cited,

2) The City's denial of promised funding in *Barnett* for an admittedly "neutral" Latino alderman, Alderman Garcia, for simply communicating with the African American aldermen,

3) The seven cases where Burke used public funds under his control to support just the white bloc and not the African Americans in any case involving a contest between them for control of City Council, and

4) The City's conduct of the *Barnett* and *Smith I* remap case itself, in which the City's legitimate interest in an expeditious and inexpensive resolution was abandoned to the white bloc's pursuit of its own private interest – to prolong the case at any cost.

Singularly or together, these facts (largely unmentioned and made all but irrelevant under the 7th Circuit's mistaken "any conceivable reason" approach) destroyed the City's proffered rationale. Because they justify outright reversal, they will be briefly discussed.

1. To be "Legitimate", the City's Purpose Must Include Following the Law

To be a "legitimate" public interest, the City's professed rationale must at minimum conform to the City's own law; it cannot be a "legitimate" governmental purpose to violate its own law. Yet that is exactly what the City did here. In *Barnett* all 50 aldermen were sued, and yet the Finance Committee Chairman chose to support only his white bloc, denying anything to the African American aldermen. Under the very ordinance (2-152-170) he cited as solely controlling, all 50 aldermen qualified, since suit had been "initiated against" them equally, and they each needed "to defend".

If the 7th Circuit's "only supporting those who support us" rationale were to hold water, the City would at least have to follow its own laws in pursuit of this objective. The proposition that the City is "defending its ordinance" is tantamount to saying the City is upholding its law. That certainly is a legitimate public purpose. But it can't break its law to uphold it. This undermined the City's rationale. Contrary to *Romer* and *Arlington Heights* the 7th Circuit disregarded this.

2. Denying Funds to a "Neutral" Alderman Reveals Improper Motive

Also made irrelevant by the 7th Circuit's mistaken standard and unmentioned in its opinion is the fact the City denied promised funds to a "neutral" Latino alderman for communicating with the African American aldermen. Sued along with all the other aldermen in *Barnett,* Alderman Garcia informed the City that he was not aligned with either the white bloc or the African American aldermen and wished to have his own attorney and procure information from all sides. Counsel was appointed. Nevertheless, when it came time for reimbursement, the City conducted an inquiry of all possible conversations he might have had with the African American aldermen, refusing payment for any time "tainted" by such

contact. The City admits its conduct in this regard was a novel departure from practice.

3. Contrary to *Arlington Heights*, the 7th Circuit Disregarded A Clear Pattern of Discrimination

There were five earlier suits akin to *Barnett/Smith I*. The same basic characters appear in each (over 80% of the same aldermen in the 1980s were also in the 1990s), with the exception of the mayor, who changed from African American (Harold Washington and Eugene Sawyer) to white (Richard M. Daley). Throughout the entire period 1980-present, the same alderman, Alderman Burke, has been Chairman of the Finance Committee, except for the 1987-89 period discussed, and has controlled the Annual Appropriation Ordinance financial accounts and disbursements under them.

The five prior suits all involved the same basic issue of control of the City Council and its legitimacy as did *Barnett* and *Smith I*.

a. *Roti I* (1983). The first such case was *Roti v. Washington, Mayor*, 450 N.E.2d 465 (Ill.App.Ct. 1983), in which the then 29 white aldermanic bloc were plaintiffs suing the mayor and City over rules changes and committee chairmanships, won the case, and Alderman Burke reimbursed them pursuant to resolution from accounts under his control.

b. *Ketchum* (1985). The second was *Ketchum v. City Council,* in which the 1980 census remap was challenged by African American voters, and held in 1985 to violate the Voting Rights Act. Alderman Burke's white bloc voluntarily intervened as defendants, lost the case, and Alderman Burke caused their attorneys fees to be reimbursed by public monies under his control as Chairman of the Finance Committee.

c. *Roti II* (1986). The third case was *Roti v. Washington*, 500 N.E.2d 463 (1986) (*Roti II*), also involving rules and committee chairmanship changes (as a result of new ward elections ordered in *Ketchum*). In *Roti II*, Alderman Burke's

white bloc were plaintiffs suing the mayor and City, lost the case, and Alderman Burke caused plaintiffs' attorneys to be reimbursed by public funds under his control.

d. *PACI* and *Ramos* (1990). The fourth and fifth cases, brought in 1990, sought to stop the election confirming the 1990 ward remap. The white bloc intervened as defendants, together with three from the African American group, their joint private attorneys being paid by public funds under Alderman Burke's control. Less than six months later, in early 1991, *Barnett* and *Smith I* were filed. The white bloc intervened in the latter. Burke paid only their attorneys fees in both, giving rise to this suit. [17]

The pattern established by these five cases is unequivocal. Each involved the same aldermanic groups, each involved a struggle for control of the City Council, and each involved the same decision maker (Burke) as Finance Committee Chairman. Whether the white bloc was aligned with the City (*Ketchum*) or adverse to it (*Roti I, & Roti II*), whether they were plaintiff suing the City or not, and whether they won or lost, Alderman Burke always made sure their fees were paid from public funds under his control. Whatever the posture of the African American aldermen, they got nothing.

Instead of following *Arlington Heights*, the 7th Circuit adopted a conflicting approach that made all these factors and prior instances all but irrelevant. [18]

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17. In none of these cases was 2-152-170, which Alderman Burke cited to Plaintiffs as the sole legal source for funding aldermanic legal fees, used or even relevant. In *Ketchum*, *Roti I* and *Roti II*, *PACI* and *Ramos*, the money came from other public fund accounts that were also in existence and used by Burke from 1991-2001 in *Barnett/Smith I*, although Alderman Burke denied their existence.

18. The 7th Circuit wrongly looked at these prior instances not as evidence of the targeting of Plaintiffs for discrimination and illegitimate purpose as *Arlington Heights* requires, but as though somehow Plaintiffs were seeking an "estoppel" against the City and so disallowing the City from ever changing its policies (Appendix A at 21a-22a). The point is

(Cont'd)

4. The City's Interest was Different from the White Bloc

The conduct of the remap litigation also revealed its true purpose. As noted, this was the longest and most expensive Voting Rights Act case in history, taking over eight years just to resolve the merits and costing the public over $16 million dollars just for the white bloc's private attorneys.

During the entire decade of the 1990s, the proper Chicago ward boundaries were unsettled and hence who the proper voters were to elect the proper aldermen. Given this, a prolonged and wildly expensive battle over ward boundaries was not in the City's interest. Rather, the City's *legitimate* interest is to have *fair and legal ward lines, settled upon as promptly and inexpensively as possible.*

Endless litigation at huge public expense defeated the City's legitimate interest. It was *no part* of the City's legitimate governmental purpose to drag out the litigation as long as possible with no concern for cost to the public. But it did serve the *private interests* of the white aldermanic bloc, who by the delay were allowed to remain in office throughout the decade. Their *personal* interest was in delay, and using all litigation ploys to accomplish it. Their *personal* interest did not include achieving a fair map inexpensively and expeditiously. The personal interest of the white aldermen in job tenure and control conflicted directly with and destroyed the City's legitimate interest in inexpensive and expeditious resolution.

Instead of recognizing this, the 7th Circuit assumed that these starkly conflicting interests were the same, just "defending the ordinance". Its approach disregarded *Romer v. Evans* and turned reality on its head. The reality was, the City's legitimate interest in expeditious resolution was abandoned to the private interest

(Cont'd)
not that the City can never change its policies. That is absurd. Rather, the point is that these prior instances are evidence of a continuity of the *true* illegitimate purpose in this case.

of the white bloc aldermen. This is not a "legitimate state purpose", but simply the co-opting of the public purse to pursue private ends.

5. If the 7th Circuit Had Not Disregarded this Court's Decisions, It Must Have Affirmed the District Court

Taken together, the above four facts show that the City's proffered public purpose "can not be credited" (*Romer v. Evans*, at 635), and is utterly inadequate to explain the City's actions. Hypothetically, it is legitimate for a city "to support those who support it" in litigation. *Arlington Heights* and *Romer*, however, required the 7th Circuit to test hypothetical rationales against simple uncontested facts, [19] and *Mt Healthy* placed the burden on the City to show an independent, non-tainted basis for decision. When this Court's proper standards are followed, the proposed rationale proves inadequate, and a "bare . . . desire to harm a politically unpopular group" emerges. (*Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), quoted in *Romer v. Evans,* at 634). This is precisely what this Court has outlawed.[20]

REASONS FOR GRANTING THE PETITION

In a classic example of Supreme Court Rule 10(c), the 7th Circuit Court of Appeals has decided important questions of federal law in conflict with applicable decisions of this Court,

19. Alderman Burke's letter invited Plaintiffs to "share" any legal authority allowing the City to pay a plaintiff alderman's legal fees, suggesting he would subsidize Plaintiffs if he had authority (Appendix A at 6a-7a). The 7th Circuit's hypothetical "only supporting those who support the City" rationale is clearly inconsistent with Burke's willingness to pay if he had "authority", which of course he had.

20. Under the 7th Circuit's misguided approach the facts undermining legitimacy are irrelevant; 1) illegally denying the African Americans equal treatment in *Barnett*, 2) denial of funds to neutral Alderman Garcia in *Barnett* for communicating with them, 3) the pattern of subsidizing only the white bloc in all cases, and 4) abdication in *Barnett/Smith I* of the City's own interest in timely and inexpensive resolution.

and decided important federal questions of national significance which have not been, but need to be, settled by this Court.

Few propositions are more settled than that no one is entitled to public subsidy, but once government decides to subsidize an activity it may not create unconstitutional conditions or draw racial or other invidious lines in dispensing the subsidy. *Perry v. Sindermann*, 408 U.S. 593, 597 (1971). Here the City did both, denying subsidy if you are African American, or unless you vote with the white bloc. The 7th Circuit opinion disregards the fact that in this case racial and political motives are inevitably mixed. Contrary to *Arlington Heights* and *Mt Healthy,* it uses the most "lenient" possible approach, reverses the burden of proof, refuses to examine the historical background and prior patterns, or test the proffered rationale for self-consistency and conformity with the facts. Contrary to *Romer v. Evans,* it accepts at face value the government's proffered basis for legitimacy regardless of inconsistency with the facts. The 7th Circuit opinion unwittingly opens the door to undemocratic mischief at the hands of local officials seeking to maintain their grip on power, thus presenting a national issue of great import needing resolution by this Court.

I. EQUAL PROTECTION

A. The 7th Circuit Disregarded this Court's Decisions on the Proper Level of Equal Protection "Scrutiny"

The 7th Circuit held that even in the face of facts undermining any purported "legitimacy" to the City actions, it must nonetheless be "deferential to the decisions of government". To the 7th Circuit, the City's discrimination against its own African American aldermen and targeting them for political apostacy involved "no fundamental right or suspect classification" (Appendix A at 14a), but involved "mere errors of government", and "[m]ere errors of government are not subject to our judicial review." Using an improper standard which caused them to fail to discuss or even mention most of the facts discussed above, the 7th Circuit held: "The City's refusal

to pay the legal expenses of the Opposition Aldermen as plaintiffs in the redistricting litigation was rationally related to the City's legitimate interest in defending the legality of its ordinances; there was no equal protection violation here." (Appendix A at 25a).

As shown, this conclusion, in this case, is inconsistent with this Court's decisions in *Arlington Heights, Mt Healthy,* and *Romer*. Furthermore, the 7th Circuit's premise that distinctions in the use of public funds between racial/political groups does not involve race and thus are not "suspect" is obtuse; racial discrimination is not less because conducted for ulterior political purposes. Here racial and political motives are inextricably mixed. As this Court said in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (special use permit can not be required for mental retardation home absent proof in the record it poses a special threat):

> "The general rule [deference to social or economic legislation] gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest [cites]. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. [cites]."

Whether "heightened scrutiny" or "strict scrutiny" or mere common sense applies here, certainly following the most "lenient" rational basis, with the burden on Plaintiffs to negative

every "conceivable" rationale, starkly defies this Court's settled law.

B. The 7th Circuit Adopted a Novel Rule Equating "Facial" and "As Applied" Cases in Conflict with this Court and Other Circuits

Contrary to other Circuits and the approach long settled in this Court, the 7th Circuit panel held that the same "lenient" standard of "rational basis" which is used in the "facial" challenge to economic legislation applies to the "as applied" actions of municipal officials who disburse public funds along racial/political lines:

> "The rational basis test is a lenient standard; . . . The government need not have articulated a reason for the challenged action at the time the decision was made. [citation] Rather, 'the burden is upon the challenging party to eliminate any 'reasonably conceivable state of facts that could provide a rational basis for the classification. [citation] This basic formulation applies whether the plaintiff challenges a statute on its face, as applied, or (as here) challenges some other act or decision of government." (Appendix A at 17a).

> "The burden was on the Opposition [African American] Aldermen to eliminate any conceivable rational basis for the City's attorneys' fees decision – not just the basis offered by Alderman Burke at the time of the denial, but those offered by the City in defense of this litigation." (Appendix A at 19a) [brackets added]

This holding conflicts with – indeed reverses – the approach taken in numerous decisions of this Court. See, e.g., *Arlington Heights*, 429 U.S. at 269 (S. Ct reviewed the evidence to test sufficiency of proffered rationale); *Mt Healthy City School District v. Doyle*, 429 U.S. 274 (1977) (after *prima facie* case,

burden shifts to city to justify). Moreover, it is inconsistent with decisions in other Circuits (see, e.g., *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (rational basis analysis differs in "as applied" and "facial" cases), as well as with opinions of the 7th Circuit itself in numerous prior "as applied" cases, in which the facts and circumstances were closely examined and hypothetical or abstract rationales not credited without testing against the facts. *Martin v. Showano-Gresham Sch. Dist.*, 295 F.3d 701, 713 (7th Cir. 2002); *Scudder v. Town of Greendale*, 704 F.2d 999, 1003 (7th Cir. 1983); *Ciechon v. City of Chicago*, 686 F.2d 511, 523 (7th Cir. 1982); *French v. Heyne*, 547 F.2d 994, 999 (7th Cir. 1976).

Facial challenges are subject to hypothetical *post-hoc* rationales for a concrete reason – there is no single decision maker to look to for explanation or examination. Of necessity, courts' deference to the co-equal branch requires this approach. But where it is not legislation that is at issue but the actions of municipal officials, such total deference is misplaced; the decision maker can be asked.[21] As *Arlington Heights* and *Mt Healthy* recognize, only by this approach can the Constitution's protection of individual rights be recognized.

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21. The 7th Circuit opinion appears driven by the misapprehension that a rule other than its broad acceptance of any hypothetical rationale would bring into court the myriad decisions of innumerable lower level public employees, thereby swamping the courts and impeding the operations of government (Appendix A at 18a, 21a). This fear is wholly misplaced. Municipalities may only be liable under 42 U.S.C. 1983 where the action complained of is or may be said to be the action of the top legal authority, reflecting municipal policy. *Respondeat superior* does not apply. *Monell v. N.Y. City Dept. of Social Services*, 436 U.S. 658, 690-691 (1978). Here, the top legal authority made the decisions, and the City has never suggested otherwise.

C. The 7th Circuit Opinion Conflicts with This Court's Decisions on How to Analyze Political/Racial Discrimination

In addition, the 7th Circuit opinion conflicts directly with the settled jurisprudence of this Court on the proper analysis of the elements of Plaintiffs' claim. In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-268 (1977) (municipal decision not to rezone to allow low income project) (full quote above), this Court set forth the governing considerations in determining whether improper intent exists, including: 1) "the impact of the official action", 2) "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes", 3) "the specific sequence of events leading up to the challenged decision", 4) "departures from the normal procedural sequence," and 5) "substantive departures".

The 7th Circuit disregarded each and every one of the above factors carefully spelled out by this Court. Instead, it created a novel, broadly lenient standard that caused it to neglect key facts and approve the City's targeting of its own African American aldermen for political/racial threat and discrimination.

D. The 7th Circuit Failed to Test the "Legitimacy" of Proffered Governmental Purpose Against the Facts

In *Romer v Evans*, 517 U.S. 620 (1996), this Court invalidated a state constitutional amendment on its face as an illegitimate exercise of state power under the "rational basis" test. The amendment precluded all state action designed to protect the status of persons based upon their "homosexual, lesbian or bisexual" orientation or conduct. The state sought to justify the law on the basis, similar to the City's effort here, that it protected other citizen's freedom of association. *Id.*, at 635. Even though working under the far more lenient standard applicable to *facial* challenges to legislation, this Court analyzed

the reality of the situation and found the state's justifications wanting, noting that:

> "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare. . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)." *Id.*, at 634-35 (emphasis in original).

"Desire to harm a politically unpopular group" is the inevitable inference of the City's actions here. *Romer* required examination of the proffered rationale for consistency with the facts. Viewing the amendment broader than the justifications offered, this Court said (*Romer v. Evans*, 517 U.S. at 635):

> "[W]e find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. 'Class legislation . . . is obnoxious to the prohibitions of the Fourteenth Amendment. . . .' *Civil Rights Cases*, 109 U.S., at 24."

II. FIRST AMENDMENT

A. The 7th Circuit's Rationale Conflicts with this Court

It was clear to Plaintiff African American aldermen that the various actions of the City complained of here communicated

a clear threat to forego their Constitutional rights to political speech and assembly or else.[22] This view was entirely reasonable.

An earlier district court judge, after agreeing that this stated a claim, later dismissed it on the ground that Plaintiffs lacked "standing" to assert it. (Appendix E at 93a-94a.) This ruling was plainly in error and the City has not sought to defend it on appeal. Instead, it has argued, and the 7th Circuit agreed, that no 1st Amendment interest of the African American aldermen is involved here at all, and that Plaintiffs merely seek an unwarranted subsidy. Thus the 7th Circuit opinion (Appendix A at 25a) recites that " a government's decision not to subsidize the exercise of a fundamental right does not infringe the right", citing *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983), and that a government may promote its own speech without having to promote that of others. As shown, applying this view here reverses this Court's law; once government determines to subsidize an activity, it cannot create unconstitutional conditions or draw invidious lines in disbursement.[23]

Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (political campaign expenditure limits violate 1st Amendment), required the 7th Circuit to examine the proffered reasons with "exacting scrutiny". *Mt Healthy,* 429 U.S. at 287, places the burden of proof on the City to show an independent, non-tainted ground

22. Litigation to resolve political issues is unquestionably a First Amendment interest. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *FCC v. League of Women Voters*, 468 U.S. 364, 381(1983). See also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1971) (one year residency requirement); *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 626 (1968) (property ownership requirement).

23. The district court expressly held that Plaintiffs *did not* seek a subsidy for their view, but equal treatment (Appendix C at 77a). They consistently sought that all aldermen be treated the same, support to all or none. The 7th Circuit confused a request for viewpoint subsidy with demands for equal treatment; stop the "white only" subsidy.

for decision. The 7th Circuit did the opposite. It placed the burden on Plaintiffs to negative all "conceivable" rationales, disregarded the clear prior pattern of white bloc subsidy, and treated the present case as if in a vacuum, with the African American aldermen seeking an unprecedented "handout", a city subsidy of "their view". But:

> "[T]his Court has made it clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' . . . Such interference with constitutional rights is impermissible."

Perry v. Sindermann, 408 U.S. 593, 597 (1971) (nonrenewal of one year contract based upon unwanted criticisms). See also *Legal Services Corp v. Velazquez*, 531 U.S. 533 (2001) (statutory prohibition of litigation challenging law violates Constitution). See also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (teacher's involuntary transfer for speaking out held to violate 1st Amendment); cf., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). The 7th Circuit ruling directly conflicts with these settled principles. As this Court has said:

> "The 'central purpose of the speech clause' in the First Amendment is to 'assure a society in which uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive."

> *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Instead, the 7th Circuit decision promotes the very opposite.

CONCLUSION

The 7th Circuit opinion conflicts with this Court's cases and long settled rules, including that although no one is entitled to a public subsidy, once government decides to subsidize an activity it may not create unconstitutional conditions or draw racial or other invidious distinctions. Over two decades, the City of Chicago did both.

Petitioners respectfully request this Court to grant review of this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 7, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 04-2755 & 04-4009

ED H. SMITH, ALLAN STREETER, DOROTHY TILLMAN, et al.,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 920—**Rebecca R. Pallmeyer**, *Judge.*

ARGUED SEPTEMBER 27, 2005.—DECIDED AUGUST 7, 2006.

Before FLAUM, *Chief Judge*, and BAUER and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* This case is satellite litigation emanating from the long-running legal battle over the remapping of Chicago's aldermanic wards following the 1990 census. Though it presents only a claim for unreimbursed attorneys' fees and related litigation expenses, it is dressed

up in constitutional clothing. The plaintiffs are Chicago aldermen who challenged the City's ward map in court and then claimed that the City's refusal to finance their legal expenses in that litigation violated their equal protection and free speech rights.

Illinois law requires the City Council to redraw Chicago's aldermanic ward boundaries after each national census. The City's attempt to create a new ward map after the 1990 census generated more than its share of federal litigation. Chicago's aldermen were divided (with a few exceptions) into two opposing camps during the political struggle over the new ward boundaries-the "Administration Aldermen," aligned with Mayor Richard M. Daley, and the "Opposition Aldermen." When the two sides could not agree, their competing ward maps were submitted to Chicago's voters via referendum as required by state law. The map proposed by the Administration Aldermen was adopted by voters and became law.

The new map was challenged in several federal lawsuits, and the two aldermanic factions lined up against each other in the consolidated litigation. As the case progressed, the City Council authorized payment of the litigation-related attorneys' fees and expenses of the Administration Aldermen who intervened to defend the map but not the Opposition Aldermen who sued to invalidate it. This decision spawned the present lawsuit, in which the Opposition Aldermen argued that this unequal treatment in the payment of attorneys' fees was unconstitutional. The suit remained pending while the redistricting litigation proceeded to trial, appeal, remand for limited retrial, and ultimately settlement. The Opposition

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Aldermen partially prevailed and were awarded some $8 million in attorneys' fees under the fee-shifting provisions of the Voting Rights Act, 42 U.S.C. §§ 1988 and 1973*l*(e).

About $250,000 in litigation expenses, however, were not included in the fee award, and those remaining unpaid expenses are at issue in this action. The district court granted summary judgment for the City on the free speech claim. Following a bench trial on the equal protection claim, the court concluded that the City's decision to pay the litigation expenses of the aldermen who defended the City's remap ordinance in court but not those who challenged it failed the rational-basis test. The court was strongly influenced by an earlier decision of the City Council to pay the litigation expenses of aldermen who sued the former mayor in an unrelated set of lawsuits stemming from the "Council Wars" of the mid-1980s. This, the court said, required the City "live with [its] decisions and treat other plaintiff-aldermen in like fashion." The court awarded the Opposition Aldermen their unreimbursed legal expenses plus prejudgment interest.

We reverse. No fundamental right or suspect classification is implicated here, so the City's action is reviewed only for a rational relationship to a legitimate governmental interest. This is a lenient standard, but the district court failed to treat it as such. Defending the City's ordinances against legal challenge is unquestionably a legitimate municipal interest, and it was entirely rational for the City to pay the litigation expenses of the aldermen who intervened on the City's side in defense of the duly adopted ward map but not those of the aldermen who sued to invalidate it. That the City Council authorized payment of

legal expenses for certain other plaintiff-aldermen in unrelated litigation years earlier does not obligate the City to finance all subsequent aldermanic litigation against it-by operation of the Equal Protection Clause or any other principle. The City is thus not required to "live with" its prior decisions in the sense suggested by the district court.

The free speech clause of the First Amendment does not provide an alternative basis upon which to uphold the judgment. The government's decision not to subsidize the exercise of a constitutional right does not infringe the right. This case does not involve viewpoint discrimination within a government-sponsored speech forum or a generalized subsidy program for private litigation. The City's decision not to underwrite the Opposition Aldermen's legal challenge to the ward map did not violate their free speech rights.

I. Background

Illinois law provides that if the Chicago City Council fails to pass a redistricting ordinance in the year that a national census is conducted, proposed ordinances supported by at least one-fifth of the aldermen may be submitted to the electorate for a referendum vote. *See* 65 ILCS 20/21-38, 20/21-40 (2002). A referendum vote became necessary in the remapping process that followed the 1990 census when the so-called Administration Aldermen and Opposition Aldermen could not reach consensus on a new aldermanic ward map. On March 17, 1992, the voters of Chicago approved the ward map submitted by the Administration Aldermen, and this map consequently achieved the status of a City ordinance.

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Three lawsuits challenging the validity of the redistricting ordinance followed closely on the heels of the referendum. In the first, *Barnett v. Daley*, nine voters alleged that the map violated the Voting Rights Act; they named all 50 aldermen as defendants in the suit. The 50 aldermen were dismissed as defendants at an early stage of the *Barnett* litigation. The second suit, also alleging violations of the Voting Rights Act, was brought by the Opposition Aldermen. In this case, *Smith v. Daley*, no aldermen were named as defendants. The third suit, *Bonilla v. City Council*, was brought by Latino voters and also did not name any aldermen as defendants. The Administration Aldermen were permitted to intervene as defendants in all three cases for purposes of defending the remap ordinance, and they retained private legal counsel to represent them. The Opposition Aldermen also retained private counsel for purposes of pursuing their claims as the plaintiffs in *Smith*. The City of Chicago and the mayor, also defendants in the three cases, were represented by the office of the City Corporation Counsel.

The three cases were consolidated for a 48-day bench trial, and the district court entered judgment for the defendants on all claims. *See Barnett v. City of Chi.*, 969 F.Supp. 1359 (N.D.Ill.1997). On appeal, this court affirmed the judgment in *Bonilla* but, for reasons not relevant here, vacated the judgments in *Barnett* and *Smith* and remanded with directions for a limited retrial. *Barnett v. City of Chi.*, 141 F.3d 699, 706 (7th Cir.1998). On remand, the district court held that the Voting Rights Act required a modification to the ward map ordinance to incorporate an additional supermajority African-American ward, and the parties entered into a consent decree modifying the ordinance in

conformity with the district court's decision. *See Barnett v. City of Chi.*, 17 F.Supp.2d 753 (N.D.Ill.1998). The district court ultimately awarded more than $8 million in attorneys' fees to the plaintiffs in the *Barnett* and *Smith* cases as prevailing parties pursuant to the fee-shifting provisions applicable to successful claims under the Voting Rights Act, 42 U.S.C. §§ 1988 and 1973 *l* (e). *See Barnett v. City of Chi.*, 122 F.Supp.2d 915 (N.D.Ill.2000), *aff'd* 3 Fed.Appx. 546 (7th Cir.2001).[1] The district court's award of fees did not include $246,354.07 (primarily expert witness fees) that were incurred by the Opposition Aldermen but were not recoverable under the Voting Rights Act or other provisions. This amount is the subject matter of the present case.

As the redistricting litigation made its way through the federal courts for nearly a decade, the City paid the attorneys' fees incurred by the Administration Aldermen. The Opposition Aldermen's request for payment of attorneys' fees, however, was denied. Specifically, on February 12, 1993, Opposition Alderman Lawrence Bloom wrote to Administration Alderman Edward Burke, in Burke's capacity as chairman of the City Council's Committee on Finance, requesting payment of legal fees on behalf of the Opposition Aldermen. Alderman Burke denied the request, citing a provision in the Chicago Municipal Code governing payment of City officials' attorneys' fees:

> In my opinion there is no basis in the Municipal Code of the City of Chicago to authorize payment

1. The fee award was initially $5 million; before the district court in the present case, the parties stipulated that this amount was increased by supplemental orders of the district court in *Smith/Barnett*.

> of [your] legal fees. Section 2-152-170 of the Municipal Code authorizes the payment of legal fees for City officials when the action has been brought against them for activities performed in the course of their employment. This Section does not authorize the payment of legal fees for those persons bringing the action···· If you believe that there is any legal authority pursuant to which the City of Chicago may pay [your] legal fees I would welcome you to share this authority with me.

Alderman Burke reiterated his position in a second letter to Alderman Bloom:

> [S]ection 2-152-170 of the Municipal Ordinances authorizes the City of Chicago to appoint outside counsel to defend an official or employee in an action or claim brought against the employee or official. It is clear that [your lawyer] is acting as the lead plaintiffs' attorney in this litigation. I have not found any language in the Municipal Code to authorize the Committee on Finance to pay the fees of outside lawyers hired to sue the City of Chicago, its officials and employees.

In February 1994, the Opposition Aldermen filed this action against the City of Chicago alleging that the City's refusal to pay their attorneys' fees while simultaneously paying the fees incurred by the Administration Aldermen violated their free speech and equal protection rights under the First and Fourteenth Amendments. The suit remained pending for the next eight years until the underlying

redistricting litigation reached its conclusion in 2001. In January 2002, the City moved for summary judgment, and the district court dismissed the free speech claim but preserved the equal protection claim for trial. Following an eight-day bench trial, the district court held that (1) the Opposition Aldermen had been "treated differently because of their membership in a group that opposed the Referendum Map espoused by the [C]ity," (2) "the City applied § 2-172-170 [the attorneys' fees ordinance] unequally with respect to Plaintiffs," and (3) the City lacked a rational basis for this difference in treatment. The court entered judgment in favor of the Opposition Aldermen in the amount of their previously unreimbursed litigation expenses, $246,354.07, plus an additional $168,956.24 in prejudgment interest.

In reaching these conclusions, the district court relied heavily on the fact that the City had, in unrelated litigation predating the present dispute by nearly a decade, paid the legal expenses of a group of aldermen (including Alderman Burke) who sued Mayor Harold Washington and other city officials during the turbulent "Council Wars" that followed Washington's election in 1983. *See Roti v. Washington,* 114 Ill.App.3d 958, 71 Ill.Dec. 30, 450 N.E.2d 465 (1983) ("*Roti I* "); *Roti v. Washington,* 148 Ill.App.3d 1005, 102 Ill.Dec. 570, 500 N.E.2d 463 (1986) ("*Roti II*"). The *Roti* cases arose out of a power struggle for control of the City Council and tested the validity of certain resolutions adopted by competing aldermanic factions regarding the organization and operation of the Council. The City assumed payment of attorneys' fees for both sides in the *Roti* cases-including Alderman Burke's group, which had initiated the suits. Burke, as chairman of the Finance Committee, authorized the payment.

The district court held that given the City's action in the *Roti* cases, its reason for denying attorneys' fees to the Opposition Aldermen in the redistricting case-that it would not authorize payment of attorneys' fees for officials who sued the City-was "unavailing" as a rational basis. The court declared that the City "must now live with" its prior decisions and "treat other plaintiff-aldermen in like fashion."

II. Discussion

A. Equal Protection

We note at the outset that the equal protection claim in this case suffers from a good deal of conceptual confusion; the precise contours of the claim are at best fuzzy. The district court held that the City, acting through Alderman Burke, applied the attorneys' fees ordinance in a discriminatory manner in denying the Opposition Aldermen's request for attorneys' fees. The ordinance in question, Chicago Municipal Code § 2-152-170, authorizes payment of attorneys' fees for City officials and employees when claims or actions are brought against them for their on-the-job conduct. More specifically, § 2-152-170 provides, in pertinent part:

> If any claim or action . . . is instituted against a current or former elected official, current or former appointed official or current or former employee of the city of Chicago . . . where such claim arises out of any act or omission, made in good faith, occurring within the scope of such person's office or employment, the chairman of

> the committee on finance of the city council, with the approval and concurrence of the mayor, may at the request of such person appoint counsel to defend such person against any such claim or action.

On appeal, the Opposition Aldermen describe their equal protection claim—and the district court's holding—more broadly than the district court apparently viewed it. They characterize their claim as a challenge to the City's discriminatory application of its "funding ordinances" in denying their request for attorneys' fees in the redistricting litigation. At oral argument, we asked counsel for the Opposition Aldermen to identify which other "funding ordinances"—beyond § 2-152-170—were at issue here; he responded that Alderman Burke "wasn't limited to [§] 2-152-170," but was not more specific. Following argument, counsel moved "To Clarify or to Correct Statements Made at Oral Argument" and identified certain numerical line items in the City's 1995 Annual Appropriations Ordinance as the source of Alderman Burke's authority to pay attorneys' fees claims of city officials.

This broader characterization of the equal protection claim appears to be on somewhat better footing than the district court's. The language of the attorneys' fees ordinance plainly does *not* authorize payment of attorneys' fees for officials who sue the City. The ordinance by its terms is limited to payment of attorneys' fees for City officials or employees in claims "instituted against" them for their job-related conduct. A strictly literal reading of this language also appears to exclude payment of the Administration

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Aldermen's attorneys' fees in the redistricting litigation, as they intervened as defendants. It plausibly could be argued that the ordinance, broadly construed, would allow payment of the Administration Aldermen's attorneys' fees; as defendant-intervenors, they were aligned with the City officials against whom the redistricting claims were originally instituted. But even the most expansive interpretation of § 2-152-170 would not encompass claims "instituted by" elected officials against the City or its officers, and that necessarily excludes the Opposition Aldermen's request for attorneys' fees from the scope of the ordinance.

The ordinance on its face thus classifies City officials and employees in a way that discriminates against the Opposition Aldermen: officials and employees who are sued in their official capacities get their attorneys' fees paid, but officials and employees who sue the City do not. But the Opposition Aldermen have specifically disavowed any facial constitutional challenge to § 2-152-170; they have characterized their claim as an "as applied" challenge to the City's unequal enforcement of its "funding ordinances," presumably including § 2-152-170. The district court treated the actual terms of § 2-152-170 as unimportant for purposes of equal protection analysis: "Regardless of the ordinance's 'proper' interpretation," the court said, "the City, which voluntarily chose to reimburse the *Roti* aldermen notwithstanding their status as plaintiffs . . . must now live with those decisions and treat other plaintiff-aldermen in like fashion."

We cannot agree. First, the proper interpretation of a statute is hardly irrelevant to a determination of the statute's

constitutionality, either on its face or as applied. "There can be little doubt that [the question of] whether a statute is constitutional fairly includes the question of what the statute says." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, __ U.S. __, __, 126 S.Ct. 1297, 1305, 164 L.Ed.2d 156 (2006). Second, a prior misapplication of the ordinance-if that's what occurred in the *Roti* cases-does not estop the City from applying it correctly in a subsequent case. The Equal Protection Clause does not entitle the Opposition Aldermen to a misinterpretation of the ordinance. Because § 2-152-170 does not authorize payment of their attorneys' fees, the district court's conclusion that the City applied the ordinance "unequally with respect to Plaintiffs" is legally untenable. So there must be some other basis for the equal protection claim apart from an "as applied" challenge to the attorneys' fees ordinance.

The alternative conceptualization of the claim offered up by the Opposition Aldermen has its own deficiencies. In their brief they argued that the district court "correctly found" the City had no rational basis for its "inconsistent application of its funding ordinances"-apparently not just § 2-152-170 but other, unspecified funding ordinances as well. This overstates the district court's holding, at least as the court purported to limit it. In a footnote to the Memorandum Opinion and Order filed following the bench trial, the court specifically noted that although the "[p]laintiffs have offered some evidence that the City paid the legal expenses . . . from sources besides § 2-172-150," the court was confining its analysis to § 2-152-170. At the same time, however, the district court's opinion assumes the existence of authority to pay aldermen's attorneys' fees apart

from that conferred by § 2-152-170; that much is implicit in the court's holding that the City had no rational basis to deny the Opposition Aldermen's *650 request for fees while granting the requests of other aldermen who would arguably be excluded from the scope of the ordinance. Also, the opinion variously uses the plural "fee payment ordinances" or generically, "ordinances." Given the internal confusion, we will give the district court's holding the broader interpretation the Opposition Aldermen ascribe to it.

The Opposition Aldermen did not identify-in their brief anyway-the other "funding ordinances" they claim the City inconsistently applied. As we have noted, after oral argument counsel identified the 1995 Annual Appropriations Ordinance as the other "funding ordinance" at issue in the case. Although the district court did not rely on it, it is in the record. The specific line items counsel identifies appear to be general funds restricted only by the following language: "for legal, technical, medical and professional services . . . to be expended at the direction of the chairman of the committee on finance." It appears we are being asked to assume that the other Annual Appropriations Ordinances covering the nine-year duration of the redistricting litigation contain similar line items and language. (We note as an aside that this court has previously described the extreme "protraction" of the redistricting litigation as "absurd." *Barnett,* 141 F.3d at 706.)

As best we can understand it, then, the equal protection violation at issue in this case can be summarized as follows: Without regard to § 2-152-170, the Finance Chairman has discretion to pay, from a generally unrestricted legal and

professional services fund in the Annual Appropriations Ordinance, the litigation-related attorneys' fees incurred by City officials; Alderman Burke exercised that discretion in a discriminatory fashion in disallowing the Opposition Aldermen's request for payment of attorneys' fees while authorizing payment of the Administration Aldermen's attorneys' fees; there is no rational basis for the discriminatory treatment. With that recapitulation of the claim, we proceed at last to the issues on appeal.[2]

The purpose of the Equal Protection Clause of the Fourteenth Amendment is to "secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923)); *Martin v. Shawano-Gresham Sch. Dist.,* 295 F.3d 701, 713-14 (7th Cir.2002). Where (as here) no fundamental right or suspect classification is at issue, equal protection claims are evaluated under the rational-basis standard of review. *Discovery House,*

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2. Responsibility for the conceptual confusion in this case rests squarely with the Opposition Aldermen, who as plaintiffs had the burden of proof. Given the lack of clarity in their articulation of the fundamentals of their equal protection claim, the internal confusion in the district court's opinion is perhaps understandable. On appeal, the City has not challenged the district court's factual findings but raises only legal error in the application of rational-basis review. We review legal issues de novo, and that has required us to reset the claim in the proper conceptual framework.

Inc. v. Consol. City of Indianapolis, 319 F.3d 277, 282 (7th Cir.2003); *Martin,* 295 F.3d at 712; *Hilton v. City of Wheeling,* 209 F.3d 1005, 1007-08 (7th Cir.2000). To prevail, a plaintiff must prove the following: (1) the defendant intentionally treated him differently from others similarly situated, (2) the defendant intentionally treated him differently because of his membership in the class to which he belonged, and (3) the difference in treatment was not rationally related to a legitimate state interest. *Schroeder v. Hamilton Sch. Dist.,* 282 F.3d 946, 950-51 (7th Cir.2002); *Discovery House,* 319 F.3d at 282.

The district court held that the Opposition Aldermen satisfied all three elements of this test. More specifically, the court held that the City discriminated against the Opposition Aldermen in their request for payment of attorneys' fees in the redistricting litigation "because of their membership in a group that opposed the Referendum Map espoused by the City" and that there was no rational basis for the discriminatory treatment. On appeal, the City concedes the first two elements and focuses its argument on the district court's application of the rational-basis test.

We pause here to note that in the district court, the parties vigorously disputed how the rational-basis test should be applied where the equal protection claim is not a facial attack on a statute but, rather, an "as applied" challenge, or more accurately here, a challenge to a decision of a government official acting pursuant to discretionary authority. The Opposition Aldermen argued in favor of an approach resembling the burden-shifting paradigm in Title VII employment discrimination litigation under *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Their position was that in a nonfacial equal protection challenge, evidence that the government's reason for decision was pretextual can establish the claim. The district court properly rejected this argument. This court has declined previous invitations to import Title VII methodology into traditional rational-basis equal protection analysis, *see Schroeder* 282 F.3d at 951, and we are not inclined to revisit the issue here.

Aside from rejecting the Title VII approach, however, the district court did not definitively resolve the parties' dispute over the proper application of the rational-basis test. Instead, the court engaged in a heavily fact-bound analysis of the City's actions and subjected the City's fees payment decision to a degree of independent judicial appraisal that is inconsistent with the deferential rational-basis standard of review.

The City asserts it was error for the district court to permit any inquiry at all into the actual motivation for the City's payment decision. Because a governmental classification "must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that could supply a rational basis for the classification," *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (emphasis added), the Supreme Court has held that the rational-basis test "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). The City argues that the

rational-basis test is not an evidentiary inquiry into the government's true motives at the time of the challenged action, but, rather, a post hoc legal inquiry into whether there is *any* conceivable rational reason for the government's decision. The Opposition Aldermen counter that the City's version of the rational-basis test applies only to facial equal protection challenges, and theirs is an "as applied" challenge. As such, they argue, the focus is properly on evidence of the City's actual (discriminatory) reason for the fees payment decision.

The City is mostly right. To the extent the Opposition Aldermen insist the focus should be on evidence of discriminatory purpose, their argument is simply misplaced. The City has conceded that it treated the Opposition Aldermen differently because of their membership in a group that opposed the City's remap ordinance; the only disputed question is whether that discriminatory treatment had a rational basis. The rational-basis test is a lenient standard; the government's action simply "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and *some* legitimate governmental purpose." *Discovery House,* 319 F.3d at 282 (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)) (emphasis added). The government need not have articulated a reason for the challenged action at the time the decision was made. *Discovery House,* 319 F.3d at 282. Rather, "the burden is upon the challenging party to eliminate any 'reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (citing *Heller,* 509 U.S. at 320, 113 S.Ct. 2637). This basic formulation applies whether the

plaintiff challenges a statute on its face, as applied, or (as here) challenges some other act or decision of government. *Id.; see also Bell v. Duperrault,* 367 F.3d 703, 708 (7th Cir.2004); *Schroeder,* 282 F.3d at 950-51; *Martin,* 295 F.3d at 712-13; *Hilton,* 209 F.3d at 1007-08; *Olech v. Vill. of Willowbrook,* 160 F.3d 386, 388 (7th Cir.1998), *aff'd,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam); *Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir.1995).

This is not to say that evidence of the government's actual reason for decision is always irrelevant in equal protection cases, however. It is the plaintiff's burden to prove the government's action irrational. The government may defend the rationality of its action on any ground it can muster, not just the one articulated at the time of decision (if a reason was given at all.) Our various departments and agencies of government make thousands of decisions every day; not every one will come with an explanation. The absence of an explanation, or even an incomplete, inadequate, or inaccurate explanation will not equate to a lack of rational basis-otherwise "the federal courts would be drawn deep into the local enforcement of . . . state and local laws." *Hilton,* 209 F.3d at 1008. Accordingly, the reason stated at the time of the challenged action may be relevant but is not dispositive in the application of rationality review.

We note that the role of subjective motivation in "class of one" equal protection cases is uncertain. Some of our cases hold that a determination of "no rational basis" in "class of one" cases requires proof of "totally illegitimate animus toward the plaintiff by the defendant" or illegitimate reasons "of a personal nature unrelated to the duties of the defendant's

position." *Id.; see also Purze v. Vill. of Winthrop Harbor,* 286 F.3d 452, 455 (7th Cir.2002); *Cruz v. Town of Cicero,* 275 F.3d 579, 587 (7th Cir.2001); *Esmail,* 53 F.3d at 180. Other cases use the disjunctive and refer to "class of one" cases as requiring no rational basis *or* proof of illegitimate animus. *See Lunini v. Grayeb,* 395 F.3d 761, 768 (7th Cir.2004); *Nevel v. Vill. of Schaumburg,* 297 F.3d 673, 681 (7th Cir.2002); *Albiero v. City of Kankakee,* 246 F.3d 927, 932 (7th Cir.2001). Still others have noted but not resolved the conflict. *See Ind. Land Co. v. City of Greenwood,* 378 F.3d 705, 713 (7th Cir.2004); *McDonald v. Vill. of Winnetka,* 371 F.3d 992, 1002 n. 3 (7th Cir.2004); *Bell,* 367 F.3d at 708 n. 1.

This is not an "illegitimate animus" equal protection case. The Opposition Aldermen do not argue that Alderman Burke's decision was based on some subjective*653 illegitimate reason, so we need not attempt to reconcile the "class of one" cases here. The burden was on the Opposition Aldermen to eliminate any conceivable rational basis for the City's attorneys' fees decision-not just the basis offered by Alderman Burke at the time of the denial, but those offered by the City in defense of this litigation.

The City argues that a municipality has a legitimate interest in defending the validity of its ordinances against legal challenge; the Opposition Aldermen do not really debate this proposition. The City also argues that it is entirely rational for a municipality to decline to subsidize litigation that seeks to invalidate a duly enacted ordinance, even when those seeking the invalidation are some of its own elected officials. We agree. However contentious and divided the

City Council may have been during the process leading up to the referendum, once the referendum was held, the City had a remapping ordinance on the books. That law, and the defense of its legality, became the official position of the City of Chicago and its governing body. The City was entitled to subsidize the litigation position of the aldermen who were defending the remap ordinance without also subsidizing the aldermen who sought to invalidate it.

This is essentially consistent with the reason Alderman Burke gave for denying the Opposition Aldermen's request for attorneys' fees; although he cited the attorneys' fees ordinance, the underlying rationale was that the City did not elect to finance litigation against itself. No doubt politics also factored in, or predominated; that does not make an otherwise rational decision irrational or render a legitimate government interest illegitimate.

"The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae,* 448 U.S. 297, 322, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Decisions about which activities should receive government subsidies and which should not are matters of policy and discretion and are especially inappropriate for judicial second-guessing under rational-basis review. *See Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (granting tax exemptions to nonprofit veterans' lobbying organizations while denying tax exemptions to all other nonprofit lobbying organizations does not violate equal protection rights of nonexempt lobbying

organization); *Harris,* 448 U.S. at 326, 100 S.Ct. 2671 (upholding Hyde Amendment against constitutional challenge in which it was argued, *inter alia,* that Medicaid's provision of medical subsidies to indigent women who carry their pregnancies to term but not those who undergo abortions violated equal protection).

Accordingly, the City's decision to deny the Opposition Aldermen's request for attorneys' fees while granting the request of the Administration Aldermen was rationally related to and furthered the City's legitimate interest in defending the legality of its remap ordinance. The only real dispute here is whether the City is precluded from relying on this rationale because it failed to adhere to it in the past, when the City paid the attorneys' fees for Alderman Burke's group of plaintiff-aldermen in the *Roti* cases. This was the core of the district court's holding: that the City must "live with" this prior decision and confer the same benefit (forever, apparently) on other aldermen who sue the City. This proposition is profound and, to our knowledge, without precedent. As a rule of law, it translates to this: the government is prohibited, in perpetuity, from defending itself against an equal protection challenge based on an otherwise legitimate and rational justification simply because that justification was not observed in a prior unrelated action.

Such a rule would wreak havoc on the orderly operation of government. We find no support for the proposition that the Equal Protection Clause so rigidly limits or "locks in" the government's decisionmaking discretion in this way. Government does not lose the right to enforce a legitimate and rational distinction by virtue of not having enforced that

distinction in an unrelated matter years earlier. The City's decision to pay the attorneys' fees of Alderman Burke's group of plaintiff-aldermen in the *Roti* cases in the mid-1980s does not foreclose the City from defending against the present equal protection claim on the basis of the perfectly rational distinction between aldermanic litigation in defense of the City's duly adopted remap ordinance and aldermanic litigation attacking it.

To the extent the district court's decision is premised not on the difference in treatment between the Opposition Aldermen and the Administration Aldermen in the redistricting litigation but the difference in treatment between the Opposition Aldermen and the plaintiff-aldermen in the *Roti* cases (a possible alternative reading), the City argues that the difference was rationally justified by distinctions in time, political circumstances, and the nature and goals of the litigation. The "Council Wars" that gave rise to the *Roti* cases were characterized by infighting among two aldermanic factions competing for control of the City Council following the election of Mayor Washington as the City's first black mayor. The first of the *Roti* cases concerned the validity of certain resolutions regarding the operation and organization of the City Council during the political and legal turmoil that surrounded the redistricting of Chicago's aldermanic wards after the 1980 census. The resolutions were adopted in a chaotic episode in which the mayor convened a Council meeting but then immediately purported to adjourn it. *Roti I*, 71 Ill.Dec. 30, 450 N.E.2d at 467. The mayor and the 21 aldermen loyal to him then left the Council chambers, but 29 aldermen remained and adopted a number of resolutions pertaining to the number of standing committees, committee

assignments, and other organizational changes. The mayor then vetoed some of the resolutions.

The group of 29 aldermen quickly went to Illinois state court seeking a declaration that the resolutions had been lawfully adopted. The mayor responded with a suit of his own seeking to enjoin implementation of the resolutions. The lawsuits were consolidated and the 21 aldermen aligned with the mayor intervened on his side. The Illinois court held that the resolutions were validly adopted because the mayor's attempt to adjourn the Council meeting was invalid, as were his vetoes; the state appellate court affirmed. *Id.* at 472-76. The second of the *Roti* cases was essentially the reverse of the first; it concerned the validity of a new resolution that reorganized the City Council once again after the conclusion of the redistricting litigation produced an even 25-25 split among the aldermen. *Roti II,* 102 Ill.Dec. 570, 500 N.E.2d at 464-65. The former aldermanic group of 29 (now reduced to 25) filed a declaratory judgment action in state court alleging that the new organizational resolution was improperly promulgated. The Illinois court held the resolution was validly adopted, and the state appellate court affirmed. *Id.* at 468.

The City suggests that the extraordinary political circumstances of the "Council Wars" and the legal exigent circumstances of the *Roti* cases provide a rational basis for the difference in treatment of the plaintiff-aldermen there and the plaintiff-aldermen here. We agree. The *Roti* cases raised the question of whether the City Council was validly organized and operating; the City had a legitimate and urgent interest in an authoritative legal determination of this

question so the power struggle would not paralyze the affairs of municipal government or call into question the legitimacy of subsequent actions taken by the Council. Payment of both sides' attorneys' fees furthered that interest. On the other hand, the redistricting litigation of the 1990s did not threaten the very operation of the City Council or the legitimacy of its actions. There was no question that the remap ordinance had been validly adopted in the referendum vote and was law, and the City therefore had a legitimate interest in defending it against legal challenge. Declining to subsidize the aldermen who sued to invalidate the ordinance furthered that interest. The difference in treatment between the two groups of plaintiff-aldermen was not irrational.

At bottom, the Opposition Aldermen are complaining about what they perceive to be political gamesmanship, but political gamesmanship-if that's what Alderman Burke was up to-does not work an equal protection violation unless the resulting decision lacks any rational basis. Even in "illegitimate animus" equal protection cases, "if the government would have taken the action anyway [absent the animus], the animus will not condemn the action." *Nevel,* 297 F.3d at 681; *see also Albiero,* 246 F.3d at 932; *Olech,* 160 F.3d at 388.

"The problems of government are practical ones and they may justify, if they do not require, rough accommodations,-illogical, it may be, and unscientific." *Metropolis Theater Co. v. City of Chi.,* 228 U.S. 61, 69-70, 33 S.Ct. 441, 57 L.Ed. 730 (1913). The rational-basis test is deferential to the decisions of government, but the district court applied it as if it were a more exacting standard, insisting on a degree of

consistency that the Equal Protection Clause does not require. "Mere errors of government are not subject to our judicial review. It is only palpably arbitrary exercises which can be declared void under the 14th Amendment." *Id.* at 70, 33 S.Ct. 441. The City's refusal to pay the legal expenses of the Opposition Aldermen as plaintiffs in the redistricting litigation was rationally related to the City's legitimate interest in defending the legality of its ordinances; there was no equal protection violation here.

B. First Amendment Claim

The First Amendment does not provide an alternative basis upon which to uphold the judgment. In their free speech claim, the Opposition Aldermen asserted that the City engaged in viewpoint discrimination by refusing to pay their attorneys' fees in the redistricting litigation while agreeing to pay those of the Administration Aldermen. The district court properly rejected this argument. It is well-established that the government's "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan,* 461 U.S. at 549, 103 S.Ct. 1997. The Supreme Court has "soundly rejected" the proposition that "if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights." *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

As "we have repeated many times, the Constitution, insofar as it creates or protects liberties, is . . . a charter of *negative* liberties." *Hilton,* 209 F.3d at 1007 (emphasis in original). As such, "[t]here is a basic difference between direct state interference with a protected activity and state

encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe,* 432 U.S. 464, 475, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). The Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of" a constitutional right. *Harris,* 448 U.S. at 318, 100 S.Ct. 2671. "[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its making." *Regan,* 461 U.S. at 550-51, 103 S.Ct. 1997 (quoting *Harris,* 448 U.S. at 316, 100 S.Ct. 2671).

The Opposition Aldermen rely on *Rosenberger v. Rector and Visitors of University Of Virginia,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), but neither case is applicable here. *Rosenberger* involved the question of viewpoint discrimination within a speech forum created by a student organization fund established by a public university to encourage a diversity of views from private speakers. *Rosenberger,* 515 U.S. at 834, 115 S.Ct. 2510. *Velazquez* involved a First Amendment challenge to a particular advocacy restriction in the federal subsidy program that established the Legal Services Corporation to provide funding for indigents' private civil litigation. *Velazquez,* 531 U.S. at 536, 121 S.Ct. 1043.

This case involves neither a City-created speech forum nor a generalized City subsidy program for private litigation. Rather, the City agreed to pay the litigation expenses of the aldermen who entered the redistricting litigation in defense of the City's remap ordinance. The positions of the City and

the Administration Aldermen were thus aligned in the redistricting litigation, and in that sense, the Administration Aldermen's "speech" was the City's "speech." The government "speaks" when it acts to "promote its own policies or to advance a particular idea." *Id.* at 541, 121 S.Ct. 1043.

The Administration Aldermen's defense of the legality of the remap ordinance plainly promoted the City's policy; the Opposition Aldermen's legal attack on the ordinance did not. *Velazquez* reiterated that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker." *Id. Rosenberger* and *Velazquez* do not support the Opposition Aldermen's free speech claim. *Rust, Regan, Harris*, and *Maher* foreclose it.

The judgment of the district court is REVERSED and the case is Remanded for entry of judgment for the City of Chicago.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED NOVEMBER 2, 2004

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 94 C 920

Judge Rebecca R. Pallmeyer

ED H. SMITH, et al.,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

Twenty-three current or former aldermen of the City of Chicago sued the City under the First and Fourteenth Amendments for unequal treatment in the payment of attorneys' fees and expenses in connection with litigation surrounding the 1992 remap of Chicago's ward boundaries. Following a bench trial, the court entered judgment in favor of Plaintiffs in the amount of $246,354.07. *See Smith v. City of Chicago,* No. 94 C 920, 2004 WL 1300180 (N.D.Ill. June

10, 2004). Plaintiffs now seek to amend the judgment to provide for an award of pre-judgment interest. For the reasons set forth below, the motion is granted.

BACKGROUND

The facts of this matter are more fully presented in this court's June 10, 2004 Memorandum Opinion and Order. *See Smith,* 2004 WL 1300180, at *1-7. This opinion assumes the reader's familiarity with the earlier decision and will summarize the relevant facts here only briefly.

In 1991, the Chicago City Council was required by law to draw a new map of the city's ward boundaries in accordance with the 1990 Census. Unable to agree on a map, the council members divided into two competing groups. One group consisted of 28 predominantly white aldermen who were generally sympathetic to Mayor Richard M. Daley's administration. This group, referred to as the "Administration Aldermen," promoted a map with 24 majority white wards, 19 majority African-American wards, and 7 majority Latino wards. A second group, 23 predominantly African-American aldermen, were at that time often at odds with Mayor Daley's administration. These aldermen, referred to as "Opposition Aldermen," are Plaintiffs in this case; they supported a map having 21 or 22 majority white wards, 21 or 22 majority African-American wards, and 7 or 8 majority Latino wards. *Id.* at *1. The two proposals were submitted for a referendum vote by Chicago voters pursuant to Illinois state election law, and on March 17, 1992, voters approved the map submitted by the Administration Aldermen (the "Referendum Map"). *Id.*

This outcome produced three lawsuits. In *Barnett v. Daley,* No. 92 C 1683, nine African-American voters claimed the Referendum Map was unconstitutional and violated the Voting Rights Act, 42 U.S.C. § 1973. In *Smith v. Daley,* No. 92 C 2104 (*"Smith I"*), Plaintiffs in this case alleged a Voting Rights Act claim on behalf of all African-American residents of the City. Finally, in *Bonilla v. City Council of the City of Chicago,* No. 92 C 2666, six Latino voters sought changes to the map that would have created additional wards "alleged to have sufficient population to permit Latino residents in those wards to elect the candidates of their choice." *Smith,* 2004 WL 1300180, at *1. All of the City's aldermen were named as defendants in *Barnett,* but the court later dismissed them from the suit in December 1992. *See Barnett v. Daley,* 809 F.Supp. 1323 (N.D.Ill.1992). None of the aldermen was named as a defendant in *Smith I* or *Bonilla,* but the Administration Aldermen voluntarily intervened as defendants in both cases. They also voluntarily intervened as defendants in *Barnett* after being dismissed from that suit. Ultimately, all three cases were assigned to Judge Brian Barnett Duff of this court, and *Smith I* was consolidated with *Barnett.* The Second Amended Complaint in *Barnett,* filed in 1993, did not name any aldermen as defendants, but the Administration Aldermen remained in the case voluntarily as defendant-intervenors. *Smith,* 2004 WL 1300180, at *1.

The Administration Aldermen and Opposition Aldermen separately retained private counsel to represent them in the aforementioned lawsuits. The City paid the attorneys' fees incurred by the Administration Aldermen for the time devoted to the case when they were named defendants as well as for the time when they participated in the litigation voluntarily

as intervenors. The City refused, however, to pay any legal fees on behalf of the Opposition Aldermen, claiming that "there is no basis in the Municipal Code of the City of Chicago to . . . authorize the payment of legal fees for those persons [who sue the City]." *Id.* at *2 (quoting Letter from Alderman Edward M. Burke to Alderman Lawrence S. Bloom of 2/16/93). The Opposition Aldermen responded with the instant lawsuit (*Smith II*) in which they allege that such disparate treatment violated their First and Fourteenth Amendment rights. *Id.* Judge Plunkett supervised discovery in the case over a lengthy period before partially granting the City's motion for summary judgment on August 1, 2002. *See Smith v. City of Chicago,* No. 94 C 920, 2002 WL 1770532 (N.D.Ill. Aug.1, 2002), *amended in part,* 2003 WL 57035 (N.D.Ill. Jan.7, 2003). Judge Plunkett held that Plaintiffs did not have standing to pursue injunctive and declaratory relief under the First Amendment, but allowed them to proceed with their claims for injunctive relief for the City's alleged racial discrimination and speech-based equal protection violations. *Id.* at *5, 6.

The case was ultimately reassigned to this court on May 20, 2003 pursuant to 28 U.S.C. § 294(b). Following an eight-day bench trial between September 17 and October 3, 2003, the court entered judgment in favor of Plaintiffs on June 10, 2004 and awarded damages in the amount of $246,354.07.[1] The court first found that Plaintiffs had

1. Plaintiffs had already been awarded extensive damages in connection with the *Smith I* and *Barnett* cases. *See Smith,* 2004 WL 1300180, at *3 ("[a]ll told, the combined total of the fees, costs and awards to Plaintiffs' attorneys for the Opposition Aldermen in (Cont'd)

standing to sue for reparative injunctive relief because it "would accord [Plaintiffs] the equal treatment to which they are entitled" notwithstanding that the disputed payment would be made to third parties (the attorneys). *Smith,* 2004 WL 1300180, at *7 (quoting *Smith,* 2002 WL 1770532, at *6). The court next determined that the City violated Plaintiffs' right to equal protection by treating them differently than the Administration Aldermen based solely on their membership in a group that opposed the Referendum Map. *Id.* at *9-11. The City failed to offer any rational basis for the differential treatment and, thus, the court ordered the City to pay Plaintiffs' attorneys' fees.[2] *Id.* at *15-19.

On June 24, 2004, Plaintiffs filed a motion to alter the judgment to provide for an additional $168,956.24 in prejudgment interest. Plaintiffs requested prejudgment

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(Cont'd)
Smith I and to the Plaintiffs' attorneys in *Barnett* exceeds eight million dollars") (internal quotations omitted). *See also Barnett v. City of Chicago,* No. 92 C 1683, 1999 WL 138813 (N.D.Ill. Mar.5, 1999); *Barnett v. City of Chicago,* 122 F.Supp.2d 915 (N.D.Ill.2000), *aff'd,* 3 Fed.Appx. 546, 2001 WL 135842 (7th Cir. Feb.16, 2001). That award, however, did not include the additional $246,354.07 in fees and costs incurred by the Opposition Aldermen awarded by this court.

2. Two of the Plaintiffs, Alderman Dexter Watson and Alderman Ricardo Munoz, never actually joined the three remap lawsuits and never incurred any attorneys' fees in that regard. Thus, they were awarded only nominal damages. A third Plaintiff, Alderman Madeline Haithcock, was not awarded any damages because she failed to present evidence to support such an award. *Smith,* 2004 WL 1300180, at *18.

interest in their post-trial memorandum but did not provide any specific figure or calculation at that time. (Plaintiffs' Post-Trial Memorandum, at 72 ("Plaintiffs seek prejudgment interest calculated at the prime rate . . . on all outstanding relief requested above"). The City did not respond to Plaintiffs' initial request in its post-trial memorandum, but now objects that an award of prejudgment interest is improper in this case.

DISCUSSION

A motion for prejudgment interest that is filed after entry of a final judgment is a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). *McNabola v. Chicago Transit Auth.,* 10 F.3d 501, 519-20 (7th Cir.1993) (citing *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 175, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989)). As the Supreme Court explained, prejudgment interest "is an element of [plaintiff's] complete compensation" and is therefore "intertwined in a significant way with the merits of the plaintiff's primary case as well as the extent of his damages." *Osterneck,* 489 U.S. at 175. Plaintiffs claim that prejudgment interest is necessary in this case to put them in the position they would have been in had the City paid their attorneys' fees immediately. (Pl. Mem. ¶ 5; Pl. Reply, at 6)[3] (citing *Matter of Oil Spill by Amoco Cadiz,* 954 F.2d 1279, 1331 (7th Cir.1992) ("[m]oney today is not a full substitute for the same sum that should

3. Plaintiffs' Motion to Amend this Court's Final Judgment to Provide for an Award of Pre-Judgment Interest is cited as "Pl. Mem. ¶ __." Plaintiffs' Reply in Support of their Motion to Amend this Court's Final Judgment to Provide for an Award of Pre-Judgment Interest is cited as "Pl. Reply, at __."

have been paid years ago"). The City argues that prejudgment interest is inappropriate because the court awarded injunctive relief and not money damages. The City also claims that prejudgment interest is not necessary to make Plaintiffs whole because Plaintiffs never lost the time value of their money. (Def. Mem., at 3-4.)[4]

A. Entitlement to Prejudgment Interest

"The basic purpose of prejudgment interest is to put a party in the position it would have been in had it been paid immediately." *American Nat'l Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Sys., Inc.*, 325 F.3d 924, 935 (7th Cir.2003). Prejudgment interest is designed to "ensure that an injured party is fully compensated for its loss," *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195, 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995), and also to prevent unjust enrichment. *Trustmark Life Ins. Co. v. University of Chicago Hospitals*, 207 F.3d 876, 885 (7th Cir.2000).

The City suggests that Plaintiffs are not entitled to prejudgment interest because they did not recover traditional compensatory damages. In ruling on the City's motion for summary judgment, Judge Plunkett held that Plaintiffs had no standing to pursue claims to recover attorneys' fees to the extent the legal representation was "on a purely contingent basis." *See Smith*, 2002 WL 1770532, at *5. In the City's view, "Judge Plunkett was clear that Plaintiffs were not

4. Defendant City of Chicago's Response in Opposition to Plaintiffs' Motion for an Award of Prejudgment Interest is cited as "Def. Mem., at __."

entitled to traditional compensatory damages" and, thus, "this Court should disallow additional remedies that are necessarily linked to traditional compensatory damage awards." (Def. Mem., at 2.) Plaintiffs correctly note that the mere fact that Plaintiffs recovered equitable relief in the form of a reparative injunction does not alone preclude an award of prejudgment interest. (Pl. Reply, at 3.) In *Securities and Exchange Comm'n v. Lipson,* 278 F.3d 656 (7th Cir.2002), for example, the defendant violated securities laws by trading on inside information. *Id.* at 659. The judge ordered him to disgorge "the loss his insider trading had avoided" and to pay prejudgment interest and punitive damages. *Id.* at 662. In affirming the award on appeal, the Seventh Circuit noted that the disgorgement was "equitable in character" and that prejudgment interest is "an equitable remedy when, as in this case, the award to which it is attached is equitable." *Id.* at 663.

The City nonetheless argues that the reparative injunction itself has sufficiently "made the Plaintiffs whole" and that prejudgment interest would constitute an unfair windfall. (Def. Mem., at 5.) Plaintiffs, the City says, "did not lose the time value of money because their lawyers (who are not a party to this suit and are not Plaintiffs) would have directly received any payment of legal fees and 'used' that money." (Def. Mem., at 3.) The Seventh Circuit has cautioned that "prejudgment interest should not be thought of as a windfall; it is simply an ingredient of full compensation that corrects judgments for the lost time value of money." *Matter of Milwaukee Cheese Wisconsin, Inc.,* 112 F.3d 845, 849 (7th Cir.1997). *See also Amoco Cadiz,* 954 F.2d at 1331 ("[p]rejudgment interest at the market rate puts both parties

in the position they would have occupied had compensation been paid promptly"); *cf. Americontainer Ltd. Partnership v. Rankin,* 25 F.3d 1053 (Table) (7th Cir.1994) ("when ··· the party to receive the award of damages has not been deprived of the use of any money, awarding pre-judgment interest would serve only as [a] penalty (or to the receiving party, a windfall").

Neither party has cited any cases where a party sought to recover prejudgment interest on money that should have been paid to a third party. The court notes that in the insurance context, courts have found that insurance companies are not entitled to prejudgment interest for the period of time prior to which they actually compensated insureds. Thus, in *Mutual Service Casualty Ins. Co. v. Elizabeth State Bank,* 265 F.3d 601, 629-30 (7th Cir.2001), the Seventh Circuit explained:

> Before it made payment to its insured, Mutual had full use of its funds; only after it compensated Jo Daviess for the loss caused by the bank was Mutual in any sense deprived of its money. At the same time, so far as we can discern from the record, Mutual itself did not pay Jo Daviess any interest on its loss. Consequently, awarding prejudgment interest to Mutual for the period of time antedating its payment to Jo Daviess would amount to a windfall.

Id. at 630. *See also American Nat'l Fire Ins.,* 325 F.3d at 937 ("[b]ecause National Insurance, as subrogee, is only entitled to indemnity for its payment to Tabacalera, we believe that the district court did not err in computing

prejudgment interest from the date that National Insurance paid Tabacalera's claim").

In this case, Plaintiffs are recovering the value of the legal fees that should have been paid to their attorneys. Plaintiffs were represented on a contingency basis and, thus, have not at any time been without the use of that money.[5] The court does not believe that Plaintiffs would unfairly profit from an award of prejudgment interest because it is the court's understanding that the money will all be turned over to Plaintiffs' attorneys. Significantly, those attorneys have in fact lost the time value of their money. At the same time, requiring the City to pay prejudgment interest will ensure that it is not unjustly enriched by its wrongful decision to withhold payment; the City has improperly used and benefitted from monies that should have been paid to Plaintiffs' attorneys years ago. *See Amoco Cadiz,* 954 F.2d at 1332 ("[a]n injurer allowed to keep the return on this money has profited by the wrong"). It is worth recalling here that the City decided to pay the attorneys' fees of the Administration Aldermen, not only when they were named as defendants in *Barnett,* but also when they chose to voluntarily intervene in all of the remap lawsuits. Regardless of the questionable merits of such a decision, the City then refused to pay any attorneys' fees voluntarily incurred by the Opposition Aldermen solely because they opposed the Referendum Map.

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5. There is no evidence that one of the Plaintiffs, Alderman Jesus Garcia, had a contingency agreement with his attorneys; he did, however, owe his attorneys $7,000 in unpaid fees. *Smith,* 2004 WL 1300180, at *4. Thus, it does not appear that Alderman Garcia was deprived of the use of his money.

Appendix B

A reparative injunction "requires the defendant to restore the plaintiff to a preexisting entitlement." *Smith,* 2003 WL 57035, at *1 (citing Dan B. Dobbs, Dobbs Law of Remedies § 2.9 at 225 (2d ed.1993)). The court has determined that Plaintiffs were entitled to equal treatment in the form of paid attorneys' fees. The City paid the legal expenses of the Administration Aldermen contemporaneously with the representation, and prejudgment interest will ensure that Plaintiffs receive the equivalent value of their representation as well. The court recognizes that the law on this issue is largely undeveloped. On the facts presented, however, Plaintiffs' motion to amend the judgment to provide for prejudgment interest will be granted on a showing that all of the money received in this case has been paid to their legal counsel.

B. Calculation of Prejudgment Interest

Prejudgment interest is measured from "the time the claim accrues until judgment is entered." *West Virginia v. United States,* 479 U.S. 305, 310 n. 2, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987). In calculating prejudgment interest, courts "should use the 'prime rate'-that is the rate that banks charge for short-term unsecured loans to creditworthy customers." *Amoco Cadiz,* 954 F.2d at 1332. In addition, "compound prejudgment interest is the norm in federal litigation." *Id.* Plaintiffs have submitted a detailed prejudgment interest calculation from the accounting firm of Weltman, Katz, Mikell & Nechtow, Ltd. The firm used the prime rate "over the course of the period of the interest accrual"; calculated prejudgment interest beginning on "the respective dates upon which each principal sum was

created"—March 9, 1992 for the law firm of Miner, Barnhill & Galland, and July 19, 1993 for the law firm of Gessler, Hughes, Socol, Piers, Resnick & Dym-and ending on June 10, 2004, the date of judgment; and compounded the interest on a monthly basis. (Ex. E to Pl. Mem.) The City does not dispute these specific calculations. Thus, Plaintiffs' request for $168,956.24 in prejudgment interest is granted.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Amend this Court's Final Judgment (Docket No. 262-1) is granted and Plaintiffs are awarded $168,956.24 in prejudgment interest. Plaintiffs must provide the court with documentation confirming that all of the monies received in this matter were paid to their attorneys.

ENTER:

s/ Rebecca R. Pallmeyer
Rebecca R. Pallmeyer
United States District Judge

Dated: November 2, 2004

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 10, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 920

ED H. SMITH, et al.,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

Twenty-three current or former aldermen of the City of Chicago have sued the City under the First and Fourteenth Amendments for unequal treatment in the payment of attorneys' fees and expenses in connection with litigation surrounding the 1992 remap of Chicago's ward boundaries.[1] This case was filed on February 14, 1994 and assigned to

1. Plaintiffs are Ed H. Smith, Allan Streeter, Dorothy Tillman, Helen Shiller, John O. Steele, Lawrence S. Bloom, Robert Shaw, Jesse J. Evans, Bobby L. Rush, Percy Giles, William M. Beavers, Toni Preckwinkle, Rickey Hendon, Joe Moore, Arenda Troutman, Shirley A. Coleman, Virgil E. Jones, Jesse Miller, Sam Burrell, Dexter Watson, Madeline Haithcock, Jesus Garcia, and Ricardo Munoz. (Uncontested Facts ¶ 1 n.1.)

Appendix C

Judge Plunkett, who supervised discovery over a lengthy period before partially granting the City's motion for summary judgment on August 1, 2002. *See Smith v. City of Chicago*, No. 94 C 920, 2002 WL 1770532 (N.D.Ill. Aug.1, 2002), *amended in part*, 2003 WL 57035 (N.D.Ill. Jan.7, 2003). The case was then reassigned to this court on May 20, 2003 pursuant to 28 U.S.C. § 294(b). Following a bench trial on all remaining issues, the City moved for judgment as a matter of law on partial findings, and both parties seek judgment in their favor on all claims. For the reasons set forth here, the City's motion is denied and judgment is entered in favor of Plaintiffs.

BACKGROUND

The facts of this matter as presented in Judge Plunkett's August 1, 2002 Memorandum Opinion and Order ("Order") were largely confirmed at trial. *See Smith*, 2002 WL 1770532, at *1-2. This opinion thus assumes the reader's familiarity with that decision.

In 1991, the Chicago City Council was required by law to draw a new map of the city's ward boundaries in accordance with the 1990 Census. *Smith*, 2002 WL 1770532, at *1; *Barnett v. Daley*, 809 F.Supp. 1323, 1326 (N.D.Ill.1992). The council members could not agree on a map, so two groups of aldermen submitted their competing proposals for a referendum vote by Chicago voters, pursuant to Illinois state election law. The first group consisted of 28 predominantly white aldermen who were generally sympathetic to Mayor Richard M. Daley's administration. These "Administration Aldermen" promoted a map with 24

majority white wards, 19 majority African-American wards, and 7 majority Latino wards. *Id.;* (Tr. 69, 156, 197-98; Uncontested Facts ¶ 8.) The second group consisted of the 23 predominantly African-American aldermen who were at that time often at odds with the mayoral administration and who are Plaintiffs in this case. These "Opposition Aldermen" supported a map with 21 or 22 majority white wards, 21 or 22 majority African-American wards, and 7 or 8 majority Latino wards. *Id.;* (Tr. 69; Uncontested Facts ¶ 9.) On March 17, 1992, City voters approved the map submitted by the Administration Aldermen (the "Referendum Map"). *Id.*

A. The Remap Litigation

Unhappy with this outcome, three groups responded by filing lawsuits. In *Barnett v. Daley*, No. 92 C 1683, nine African-American voters claimed the Referendum Map was unconstitutional and violated the Voting Rights Act, 42 U.S.C. § 1973. In *Smith v. Daley*, No. 92 C 2104 ("*Smith I*"), Plaintiffs in this case alleged a Voting Rights Act claim on behalf of all African-American residents of the City. Finally, in *Bonilla v. City Council of the City of Chicago*, No. 92 C 2666, six Latino voters sought changes to the map that would have created additional wards "alleged to have sufficient population to permit Latino residents in those wards to elect the candidates of their choice." (Uncontested Facts ¶¶ 11-13.) All of the City's aldermen were named as defendants in *Barnett*, but the court later dismissed them from the suit in December 1992. *See Barnett v. Daley*, 809 F.Supp. 1323 (N.D.Ill.1992); (Uncontested Facts ¶ 14.) None of the aldermen was named as a defendant in *Smith I* or *Bonilla*, but the Administration Aldermen voluntarily intervened as

defendants in both cases. They also voluntarily intervened as defendants in *Barnett* after being dismissed from that suit. *Id.*; (Uncontested Facts ¶¶ 11-14; DX 15.) Ultimately, all three cases were assigned to Judge Brian Barnett Duff of this court, and *Smith I* was consolidated with *Barnett*. (*Id.* ¶ 15.) The Second Amended Complaint in *Barnett*, filed in 1993, did not name any aldermen as defendants, but they remained in the case voluntarily as defendant-intervenors. (*Id.* ¶ 31.)

B. The Dispute Over Attorneys' Fees- *Smith II*

The Administration Aldermen and Opposition Aldermen separately retained private counsel to represent them in the aforementioned legal proceedings. *Smith*, 2002 WL 1770532, at *1. The Administration Aldermen were represented by the law firms of Jenner & Block, Pope & John, and Donald Hubert & Associates. (Uncontested Facts ¶ 27.) At the direction of Alderman Edward M. Burke, Chairman of the Finance Committee of the City Council, the City paid the attorneys' fees of the Administration Aldermen both when they were named as defendants in *Barnett*, and after they voluntarily intervened as defendants in that case and in *Smith I* and *Bonilla*. (*Id.* ¶¶ 30, 32.) In total, the City paid more than $16 million in legal fees on behalf of the Administration Aldermen. *Smith*, 2002 WL 1770532, at *1; (Tr. 579; PX 88, at 45-46; Uncontested Facts ¶ 23.)

The Opposition Aldermen were represented by Judson Miner of Miner, Barnhill & Galland. (Uncontested Facts ¶ 28.) On February 12, 1993, Alderman Lawrence Bloom sent a letter to Alderman Burke on behalf of the Opposition

Appendix C

Aldermen requesting reimbursement for attorneys' fees they incurred in connection with the *Smith I* litigation. (*Id.* ¶¶ 33, 34; PX 28.) Alderman Burke refused to pay those fees, stating in a February 16, 1993 letter that "there is no basis in the Municipal Code of the City of Chicago to . . . authorize the payment of legal fees for those persons [who sue the City]." (*Id.* ¶ 34; PX 29, Letter from Burke to Bloom of 2/16/93.) According to Alderman Burke,

> Section 2-152-170 of the Municipal Code[2] authorizes the payment of legal fees for City officials when an action has been brought against them for activities performed in the course of their employment. This Section does not authorize the payment of legal fees for those persons bringing the action.

(PX 29.) A month later, Alderman Burke reiterated these sentiments in another letter to Bloom dated March 16, 1993: "I have not found any language in the Municipal Code to

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2. Section 2-152-170 states:

> If any claim or action, either civil or criminal in nature, is instituted against a current or former elected official, current or former appointed official or current or former employee of the city of Chicago or any agency of the city of Chicago where such claim arises out of any act or omission, made in good faith, occurring within the scope of such person's office or employment, the chairman of the committee on finance of the city council, with the approval an concurrence of the mayor, may at the request of such person appoint counsel to defend such person against any such claim or action.

authorize the Committee on Finance to pay the fees of outside lawyers hired to sue the City of Chicago, its officials and employees." (PX 30, Letter from Burke to Bloom of 3/16/93.)

Another alderman, Jesus Garcia, retained his own separate counsel, Matthew Piers of Gessler, Flynn, Fleischmann, Hughes & Socol, to represent his interests after being named as a defendant in *Barnett*. (Uncontested Facts ¶ 35.) Alderman Garcia, who by March 1993 was a state senator, took positions in the case that were different from any other party. (*Id.* ¶ 36; PX 17B.) Mr. Piers exchanged letters with Alderman Burke and Susan Lichtenstein, the City's Deputy Corporation Counsel, regarding Alderman Garcia's legal expenses, and on July 19, 1993, the City voluntarily paid some $74,479.20 in fees and costs Alderman Garcia incurred in connection with the *Barnett* case. (PX 17, Letter from Piers to Burke of 9/15/92; PX 17A, Letter from Piers to Burke of 1/28/93; PXB, Letter from Piers to Lichtenstein of 3/3/93; PX 18, Letter from Burke to Piers of 7/19/93.) Alderman Garcia claims, however, that the City refused to reimburse approximately $7,000 in additional expenses arising from his legal representation in that case. (*Id.* ¶¶ 37, 38.)

Three additional aldermen, Dexter Watson, Madeline Haithcock, and Ricardo Munoz, all appointed in 1993 after the referendum vote, also asked Alderman Burke in March 1993 about the possibility of getting reimbursed for legal expenses if they decided to intervene in the redistricting litigation. *Smith*, 2002 WL 1770532, at *1, (PX 31.) By letter dated March 16, 1993, Alderman Burke informed Alderman

Watson that § 2-152-170 of the Chicago Municipal Code "authorizes appointment of private counsel only to defend against an action brought against an official or employee." (Uncontested Facts ¶¶ 39-40; PX 32, Letter from Burke to Watson of 3/16/93.) Alderman Munoz testified that Alderman Burke told him during a brief conversation in the spring or summer of 1993 that the City would not pay his legal expenses if he chose to intervene in the litigation because he was "not part of the City Council when these [re-]maps were adopted." (Tr. 368-70.) Alderman Munoz sought leave to intervene as a plaintiff in the consolidated *Smith II Barnett* cases in any event, enlisting the legal assistance of Mr. Piers. The court denied Alderman Munoz's request on December 22, 1994, and the City refused to pay his legal expenses. (Tr. 370-71; Uncontested Facts ¶ 42.)

On February 14, 1994, the Opposition Aldermen filed the instant lawsuit (*Smith II*) alleging that the City violated their First and Fourteenth Amendment rights by failing to pay their legal fees and expenses incurred in connection with *Barnett*, *Smith I*, and *Bonilla*, while at the same time paying those same expenses on behalf of the Administration Aldermen. The Opposition Aldermen sought fees for Judson Miner and Matthew Piers, a declaration that the City's failure to pay those fees violated their First Amendment right to free speech and Fourteenth Amendment right to equal protection of the laws, and present and future injunctive relief.

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C. The *Barnett, Smith I,* and *Bonilla* Decisions

While this action for fees was pending, the consolidated Voting Rights Act cases proceeded to trial before Judge Duff on February 28, 1996. Following a 48-day bench trial ending August 1, 1996, Judge Duff ruled in favor of Defendants on all claims in *Barnett, Smith I,* and *Bonilla* on June 9, 1997. *See Barnett v. City of Chicago*, 969 F.Supp. 1359 (N.D.Ill.1997). On April 1, 1998, the Seventh Circuit affirmed the decision with respect to the *Bonilla* plaintiffs but vacated the decision with respect to the consolidated *Barnett/Smith I* plaintiffs. *See Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir.1998).[3] On remand, the case was

3. The Seventh Circuit found that the district court erred in reclassifying certain white majority wards as "multi-racial" under the theory that white aldermen were attentive to the interests of black voters in those wards. 141 F.3d at 703. Though undoubtedly true, the court stated, "the blacks would prefer to elect black aldermen and cannot." *Id.* Once those white majority wards were reclassified as such, the City's map produced 24 white majority wards (48%), 19 black majority wards (38%), and 7 Latino majority wards (14%). The population of Chicago, however, was 38% white, 39% black, and 20% Latino. *Id.* That did not end the inquiry in the Seventh Circuit's view because "citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the [Voting Rights Act]." *Id.* at 704. Using that model, whites comprised 46% of the population, blacks 40%, and Latinos 11%. *Id.* Thus, Latinos were overrepresented in the City's map (securing a majority in 14% of the wards with only 11% of the population) and had "no basis for complaining." *Id.* at 705. Blacks, on the other hand, were underrepresented because the City's map gave them only 38% of the wards though they comprised 40% of the population. The judgment as to the black plaintiffs was therefore vacated and remanded to the district court. *Id.* at 706.

reassigned to Judge Elaine Bucklo who, after a three-day retrial, found that the Referendum Map violated the Voting Rights Act. *Barnett v. City of Chicago*, 17 F.Supp.2d 753, 754 (N.D.Ill.1998). After that ruling, the parties entered into a consent decree modifying the ward map. *Id.* at 759; Case No. 92 C 1683, Docket Nos. 747-53. The court awarded statutorily allowed attorneys' fees and costs to the plaintiffs (including the Opposition Aldermen) as "prevailing parties" under 42 U.S.C. § 1983. *See Barnett v. City of Chicago*, No. 92 C 1683, 1999 WL 138813 (N.D.Ill. Mar.5, 1999); *Barnett v. City of Chicago*, 122 F.Supp.2d 915 (N.D.Ill.2000), *aff'd*, 3 Fed.Appx. 546, 2001 WL 135842 (7th Cir. Feb.16, 2001). All told, the "combined total of the fees, costs and awards to Plaintiffs' attorneys for the Opposition Aldermen in *Smith I* and to the Plaintiffs' attorneys in *Barnett* exceeds eight million dollars." (Uncontested Facts ¶ 51.) It is undisputed, however, that the court's award did not include an additional $246,354.07 in fees and costs incurred by the Opposition Aldermen, the amount at issue in this lawsuit. (*Id.* ¶¶ 20, 21.)

D. The *Smith II* Decisions

1. Motion for Summary Judgment

On January 4, 2002, the City moved for summary judgment in the instant *Smith II* case arguing, among other things, that Plaintiffs lacked standing to pursue their claims and that they could not establish any equal protection violation. On August 1, 2002, Judge Plunkett granted the motion in part and denied it in part. The court held that Plaintiffs had no standing to pursue their claims to recover

attorneys' fees owed to Judson Miner because he was representing them "on a purely contingent basis" and Plaintiffs offered no evidence that they remained liable to Mr. Miner for any outstanding fees. *Smith*, 2002 WL 1770532, at *5. There was no evidence of a similar contingency agreement between Mr. Piers and Alderman Garcia, however, nor any evidence that Mr. Piers had fully absolved Alderman Garcia of his obligation to pay the $7,000 in outstanding fees. Alderman Garcia thus had standing to pursue his claim for money owed. *Id.* As for Plaintiffs' standing to pursue injunctive and declaratory relief under the First Amendment, the court found no evidence, other than one alderman's speculation that the City's action "would make [her] think twice" about engaging in a redistricting battle in the future, that the City's refusal to pay attorneys' fees had any chilling effect on Plaintiffs' speech. Absent such evidence, the court stated, Plaintiffs did not have standing to pursue First Amendment claims for injunctive and declaratory relief. *Id.*

On the other hand, Plaintiffs did have standing to pursue injunctive relief for the City's alleged racial discrimination and speech-based equal protection violations. Those claims both arose from the City's "refusal to pay Plaintiffs' legal fees pursuant to its ordinances [which] forced them to file this suit, a burden not shared by the aldermen whose redistricting views the City favored." *Id.* at *6. In the court's view, an injunction requiring the City to pay Plaintiffs' attorneys' fees in the remap cases would redress both (1) Plaintiffs' allegation that the City failed to "treat them equally under the ordinances that permit payment of aldermanic legal fees because of their political views and

race"; and (2) Plaintiffs' allegation that the City "denied them equal protection because of their opposition to the referendum map." *Id.* (citing *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984)) ("when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment"). Plaintiffs did not, however, have standing to seek an injunction barring future unequal treatment, or any declaratory relief for their equal protection claims. *Id.* at *6-7.

Turning to the merits of Plaintiffs' equal protection claims, the court found that Plaintiffs demonstrated that they were an identifiable "class" because they all opposed the Referendum Map favored by the City and were all denied payment of their legal fees. *Id.* at *7. The City argued that Plaintiffs were not similarly situated to the Administration Aldermen because the ordinances governing payment of aldermanic legal fees only authorize reimbursement of attorneys' fees incurred by aldermen who are defending the City's interests, and not to those who are plaintiffs or "nominal" defendants. *Id.* In denying summary judgment on this issue, the court noted Plaintiffs' contrary evidence that the City twice paid the legal fees of certain other aldermen who had sued the City. *Id.* at *8. Specifically, during the administration of Mayor Harold Washington, a group of aldermen twice filed suit against the mayor over the validity of certain City Council procedures and resolutions. *Id. See Roti v. Washington*, 114 Ill.App.3d 958, 71 Ill.Dec. 30, 450 N.E.2d 465 (1st Dist.1983) ("*Roti I*"); *Roti v. Washington*, 148 Ill.App.3d 1006, 102 Ill.Dec. 570, 500 N.E.2d 463 (1st Dist.1986) ("*Roti II*"). The attorney representing the aldermen, William Harte, "submitted his bills to the finance

committee and received payment for them from a line item in the budget ordinance attributed to the city council and its committees." *Smith*, 2002 WL 1770532, at *8. (*See also* Uncontested Facts ¶¶ 52-58.)

The court next considered whether Plaintiffs had presented sufficient evidence of less favorable treatment based on their race or political views. On the issue of racial discrimination, Plaintiffs submitted an expert report from Dick W. Simpson, professor of political science at the University of Illinois at Chicago. Professor Simpson, who himself served as an alderman from 1971 to 1979 and who has published numerous articles and studies on the Chicago City Council, concluded that increasing minority representation in the Council would weaken Mayor Daley's control of the Council because "minority aldermen have a strong probability of joining and supporting the Independents or Opposition bloc." *Id.* at *9; Tr. 267-68, 272-73. The court found that conclusion too speculative in that it was based on certain suppositions that were neither inevitable nor even likely to occur. *Id.* The court therefore dismissed Plaintiff's race discrimination claims. Judge Plunkett was persuaded, however, that Plaintiffs' evidence that the City had paid the legal fees of the *Roti I* and *Roti II* plaintiffs supported an inference of bias against Plaintiffs because of their opposition to the Referendum Map. *Id.* at *10, 102 Ill.Dec. 570, 500 N.E.2d 463. The City argued that the *Roti* plaintiffs are not comparable to Plaintiffs in this case "given the difference in time, in City Council composition and in the desired goals of the respective litigations." *Id.* (quoting City of Chicago's Reply Brief to Supplemental Renewed Motion for Summary Judgment, at 10). The court disagreed: "plaintiffs here and

those in the *Roti* cases are identical in the only respect that matters: they both sued the City." *Id.* at *11, 102 Ill.Dec. 570, 500 N.E.2d 463.

The court also rejected the City's argument that unlike the *Roti* plaintiffs, who "sought declaratory judgments as to the validity of certain City Council resolutions and procedures," Plaintiffs in this case "were seeking judgments that members of the City Council engaged in intentional race discrimination when they voted for [the referendum map]." *Id.* According to the court,

> the City paid the *Roti* plaintiffs' fees because it found their claims less offensive than those asserted by plaintiffs in *Barnett.* That explanation-we only pay the legal fees of aldermen-plaintiffs if we deem the cause worthy-is virtually an admission that the City does not apply the fee payment ordinances in a content-neutral fashion.

Id.

2. Motions for Reconsideration

After receiving Judge Plunkett's decision, both parties moved for reconsideration. On January 7, 2003, the court granted both motions in part and denied them in part. *See Smith v. City of Chicago*, No. 94 C 920, 2003 WL 57035 (N.D.Ill. Jan.7, 2003). The court upheld its finding that Plaintiffs had standing to pursue a speech-based equal protection claim even though they lacked standing to proceed on a claim brought directly under the First Amendment.

Id. at *1. In doing so, the court rejected the City's argument that Plaintiffs could not seek injunctive relief absent some showing of a threat of future injury, a threat the court had found lacking in the original motion for summary judgment. *Id. See also Smith*, 2002 WL 1770532, at *6-7. The court recognized that all injunctions seek prospective relief, but distinguished Plaintiffs' claims as follows:

> Plaintiffs' claim for an injunction barring the City from applying the fees ordinances in a discriminatory manner . . . seeks to prevent a future injury. Their claim for an injunction requiring the City to pay their lawyers' outstanding fees ··· seeks to redress an injury that has already occurred: their unequal treatment under the ordinances. Standing for the former injunction requires proof that the City is likely to apply the fees ordinances unequally in the future. Standing for the latter, like for an order of reinstatement, does not.

Id. at *1 (citing Dan B. Dobbs, Dobbs Law of Remedies § 2.9 at 225 (2d ed.1993)) (comparing "preventive" and "reparative" injunctions).

The court also rejected the City's claim that an order to pay Plaintiffs' lawyers is the "equivalent of a damage award, a form of relief outside the realm of equity." *Id.* at *2. Relying on *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), the court found that the requested injunction would not compensate Plaintiffs for their constitutional injury, but would "accord them the equal

treatment to which they are entitled." *Id.* (citing *Bowen*, 487 U.S. at 895) ("[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but an attempt to give the plaintiff the very thing to which he was entitled") (internal quotation and citation omitted). The court did clarify, however, that Plaintiffs could only be reimbursed for their fees incurred in connection with the remap litigation; reimbursement for their fees in this lawsuit "would not garner them equal protection under the ordinances." *Id.* at *3.

The City again insisted that Plaintiffs were not similarly situated to the Administration Aldermen because Plaintiffs sued the City while the Administration Aldermen defended it. *Id.* at *5. The court disagreed, finding evidence that the City had not previously relied on the suing/defending distinction in deciding whether to pay an alderman's legal fees. The City tried to discount those *Roti* cases as irrelevant, but the court found nothing in the record to suggest that the City's fee payment decisions were impacted by the City's suggested distinguishing factors, such as the passage of time or the change in administration. Indeed, Alderman Burke remained the decision-maker on fee requests from the time of *Roti* to the present lawsuit. *Id.* Unable to distinguish between aldermen who sue and those who defend the City, the court concluded that the City must offer some other rational basis for the difference in treatment between Plaintiffs and the Administration Aldermen. The City failed to do so and, thus, the court affirmed its denial of summary judgment on Plaintiffs' speech-based equal protection claims. *Id.* at *6, 71 Ill.Dec. 30, 450 N.E.2d 465.

Finally, the court affirmed its holding that, with the exception of Alderman Garcia, Plaintiffs lacked standing to pursue damage claims to recover their attorneys' fees. *Id.* at *6, 7, 71 Ill.Dec. 30, 450 N.E.2d 465. The court found, however, that Plaintiffs were eligible to recover nominal damages for any constitutional violation. *Id.* at *7, 71 Ill.Dec. 30, 450 N.E.2d 465 (citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)) ("the denial of procedural due process [is] actionable for nominal damages without proof of actual injury").

3. The Bench Trial

On May 20, 2003, the case was reassigned to this court pursuant to 28 U.S.C. § 294(b). The court held an eight-day bench trial on all remaining claims between September 17 and October 3, 2003. At the conclusion of Plaintiffs' evidence, the City moved for judgment as a matter of law on partial findings pursuant to Fed.R.Civ.P. 52(c). Both parties also seek judgment in their favor based on the full trial.

DISCUSSION

The City advances three primary arguments in support of its claim for judgment in its favor: (1) Plaintiffs failed to demonstrate that they are entitled to a reparative injunction; (2) Plaintiffs are not similarly situated to the Administration Aldermen in the remap cases; and (3) the City has several rational bases for treating Plaintiffs differently than the Administration Aldermen. Plaintiffs dispute these claims and insist that they have satisfied their burden of establishing a constitutional violation. The court considers each argument in turn.

Appendix C

I. Reparative Injunctive Relief

The City first asks this court to revisit Judge Plunkett's earlier rulings that Plaintiffs have standing to seek a reparative injunction ordering the City to pay their attorneys' fees. (Def. Mem ., at 2; Def. Reply, at 2-3.)[4] The City argues that Plaintiffs have not demonstrated a " 'concrete and particularized' injury to *themselves* which can be remedied by judicial relief " because the payments they seek will go to their attorneys. (*Id.* at 3.) The City also claims that Plaintiffs are merely seeking money damages and notes that Judge Plunkett has already determined that Plaintiffs lack standing to seek such relief. (*Id.* at 6.) In this court's view, however, that was not Judge Plunkett's ruling: Judge Plunkett determined that the requested injunction "would accord [Plaintiffs] the equal treatment to which they are entitled" notwithstanding that the money would go to third parties. *Smith*, 2003 WL 57035, at *2. *See also Smith*, 2002 WL 1770532, at *6 ("plaintiffs' injury can be redressed by an injunction requiring the City to pay their attorneys' fees in the remap cases"). Moreover, Judge Plunkett specifically rejected the City's argument that an order to pay Plaintiffs' attorneys is the equivalent of a damage award. *Smith*, 2003 WL 57035, at *2 (citing *Bowen*, 487 U.S. at 895) ("[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but an attempt to give the plaintiff the very thing to which he was entitled").

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4. The Memorandum in Support of Defendant City of Chicago's Motion for Judgment as a Matter of Law on Partial Findings is cited as "Def. Mem., at __." Defendant City of Chicago's Response to Plaintiffs' Post-Trial Brief and Reply in Support of its Motion for Judgment on Partial Findings is cited as "Def. Reply, at __."

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The City next suggests that Plaintiffs lack standing because none of the categories of money they seek is fairly traceable to dissimilar treatment. (Def. Mem., at 3.) The City notes, for example, a lack of evidence that it paid pre-litigation fees for the Administration Aldermen comparable to those requested by Plaintiffs, or that it shared any common experts with Plaintiffs as it did with the Administration Aldermen. (*Id.*) The court disagrees that standing depends on a showing that Plaintiffs seek identical categories of relief as those paid on behalf of the Administration Aldermen. The gravamen of Plaintiffs' complaint is that they were treated unequally because the City refused to pay any of their attorneys' fees. There is no evidence in the record that the City would have paid Plaintiffs' legal fees if only they had requested properly compensable items.

Equally unavailing is the City's assertion that Plaintiffs lack standing because the specific funds with which their attorneys could have been paid are no longer available and would therefore constitute "substitute relief." (Def. Mem., at 6; Def. Reply, at 3-4; Tr. 439.) The City cannot divest Plaintiffs of standing by denying their relief for so long that the particular appropriation funds at issue become depleted or revert back to the general coffers. The mere fact that Plaintiffs may ultimately receive equal treatment through payment of 2004 dollars as opposed to 1990's dollars does not convert their claim for injunctive relief into one for money damages.

With respect to Alderman Garcia, the City contends that the evidence at trial confirmed that he is not liable to Matthew Piers for any legal fees. Specifically, Mr. Piers testified that

he never sent any bills to Alderman Garcia directly but, instead, submitted them to the City for payment. (Def. Mem., at 2 n.2; Tr. 203, 242.) The court does not see how this demonstrates that Alderman Garcia has no obligation to pay Mr. Piers' $7,000 in legal fees which remain due and owing on the firm's financial books. (Tr. 217-18, 220 .) Significantly, Mr. Piers did not testify that he has no intention of seeking to recover any of these fees from Alderman Garcia in the event Plaintiffs are unsuccessful in this case. Thus, Alderman Garcia has standing to recover his outstanding attorneys' fees from the remap litigation.

Judge Plunkett thoroughly considered the standing issue not once but twice, and this court is not inclined to overturn his decisions. (Tr. 677.) The City has not offered any new evidence to support its standing challenge but simply asks this court to find that Judge Plunkett's analysis was wrong. The court finds that Judge Plunkett properly decided Plaintiffs' standing in this case and will not grant judgment in the City's favor on that basis.

II. Equal Protection

The parties agree that to establish an equal protection violation, Plaintiffs must show that (1) they are members of a protected class; (2) the City treated them differently than similarly situated aldermen outside of the protected class; and (3) the City acted with discriminatory intent. *See, e.g., Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir.1990). Plaintiffs are not members of a suspect class, so they must also show that the discriminatory intent was not rationally related to a legitimate state interest. *See, e.g., Schroeder v. Hamilton Sch.*

Dist., 282 F.3d 946, 950-51 (7th Cir.2002). The City argues that it did not treat Plaintiffs differently from any similarly situated aldermen and that it has five rational bases for any differential treatment in any event. Plaintiffs insist that they are similarly situated to the Administration Aldermen and to the *Roti* aldermen, and that the City has failed to establish an actual basis for the different treatment that is not a pretext for unlawful discrimination.

A. Different Treatment of Similarly Situated Aldermen

The City argues that Plaintiffs are not similarly situated to the Administration Aldermen because in *Barnett* and *Smith I*, Plaintiffs were suing the City in their capacity as voters seeking to overturn a duly enacted city law, whereas the Administration Aldermen were defending the law in their official capacities as aldermen. (Def. Reply, at 5.) In the City's view, this readily explains Alderman Burke's position that the City could not reimburse Plaintiffs for legal fees but could do so for the Administration Aldermen. (*Id.* at 6.) *See also* Municipal Code § 2-152-170. The City claims, moreover, that if it had paid Plaintiffs' attorneys' fees but not those of the other private citizens who filed suit in *Barnett* and *Bonilla*, it faced a potential equal protection challenge from those private citizens. (*Id.*) As for the *Roti* cases, the City says, they are similarly inapposite because unlike Plaintiffs, the plaintiff-aldermen in *Roti* sued the City in their official capacities to resolve a dispute regarding City Council parliamentary procedure. (Def. Mem., at 8 n.6.)

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The court is not convinced Plaintiffs are dissimilar from the Administration Aldermen and the *Roti* aldermen merely because the City has labeled them "voters." First and foremost, Plaintiffs and the Administration Aldermen were all named as defendants in the *Barnett* case based on their positions as aldermen. The City nevertheless refused to pay Plaintiffs' legal fees even for the period before they were dismissed from that case. In addition, the City never raised the voter-alderman distinction until the eve of trial, which casts serious doubt on its claim that Plaintiffs were denied reimbursement on that basis. Rather, this new semantic distinction appears to be the City's final attempt to avoid Judge Plunkett's ruling that the City cannot justify treating Plaintiffs differently than the Administration Aldermen were treated merely because they adopted a position that was offensive to the administration. *Smith*, 2002 WL 1770532, at *11 ("[t]hat explanation-we only pay the legal fees of aldermen-plaintiffs if we deem the cause worthy-is virtually an admission that the City does not apply the fee payment ordinances in a content-neutral fashion").

The evidence is clear that all of the aldermen in the remap litigation had the same interest in the boundaries of their constituencies and were acting to achieve a map they believed to be fair. Alderman Toni Preckwinkle, for example, testified that she participated as a plaintiff in *Smith I* because she wanted "the best ward I could get." (Tr. 83.) In his February 12, 1993 letter to Alderman Burke, Alderman Bloom similarly noted that "[e]very alderman has an interest in making sure that the fairest possible map is adopted . . ." (PX 28.) Alderman Burke himself conceded that "every member of every legislative body certainly has an interest in

his or her constituency and the boundaries of the constituency." (Tr. 483.) Moreover, the City cannot fairly argue that the Administration Aldermen had no interest in the litigation in their capacities as voters. The remap litigation arose within the scope of Plaintiffs' offices as aldermen, and the mere fact that Plaintiffs are also voters does not establish that they were ineligible to have their legal fees reimbursed based on their status as aldermen.

The City makes much of the fact that Plaintiffs only had standing to sue in *Smith I* based on their status as voters. (Def. Reply, at 8.) Plaintiffs' standing to sue in that case, however, is not dispositive as to whether they were also acting in their official capacities as aldermen to justify an award of legal fees under the Municipal Code. Nothing in the ordinances conditions payment on standing to sue as an official. *See, e.g.*, § 2-172-720 (allowing appointment of counsel to defend any "claim [that] arises out of any act or omission, made in good faith, occurring within the scope of [an official's] office or employment"). Moreover, Alderman Burke testified that his unwillingness to appoint counsel for Plaintiffs in the remap litigation was not based on the fact that the litigation involved voting rights. (Tr. 509.)

In sum, the court finds that Plaintiffs are similarly situated to both the Administration Aldermen and the *Roti* aldermen for purposes of their equal protection claims, and they were treated differently than those other aldermen because the City did not reimburse their legal fees.

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B. Intentional Discrimination Based on Group Membership

The City next argues that even if it treated Plaintiffs differently than similarly situated aldermen, Plaintiffs have not established that it was because of their membership in a protected class. Judge Plunkett earlier held that Plaintiffs could not pursue an equal protection claim based on race, *Smith*, 2002 WL 1770532, at *10, but he found sufficient evidence of a "class" based on the fact that Plaintiffs "all opposed the referendum map favored by the City and were all denied payment of their legal fees under the City's ordinances." *Id.* at *7. Plaintiffs claim that the City refused to pay their legal fees because it wanted to maintain control of the City Council "by squashing the views of the Opposition Aldermen and their ability to increase their numbers through a lawful ward remap." (Pl. Trial Br., at 59.) Plaintiffs recount the so-called "Council Wars" of the 1980's and argue that "the struggle over the new map was a struggle over the racial boundaries of the wards, and the racial boundaries determined whether the Daley forces controlled the City Council." (*Id.* at 60.)

According to Professor Simpson, between 1983 and 1994, an alderman's race tended to be a predictor of whether he or she would support or oppose the administration. In addition, there was a correlation between the racial population of a ward and the race of the alderman elected to serve in that ward. (Tr. 310, 313.) When Richard M. Daley became mayor, the Administration Aldermen voted with his administration an average of 95 percent of the time, compared to the Opposition Aldermen who voted with the

administration only about 46 percent of the time on average. (Tr. 294-97.) With two exceptions, the Administration Aldermen are all white; with three exceptions, the Opposition Aldermen are all African-American. (Uncontested Facts ¶¶ 8, 9.) In Professor Simpson's view, the map supported by the Opposition Aldermen would have created two to four new wards with an African-American majority. Given that African-American voters tend to select aldermen of the same race, the opposition map would likely have resulted in at least two new aldermen who did not support Mayor Daley a majority of the time, "ma[king] the mayor's control more tenuous." (Tr. 315-16.) Based on this data, Professor Simpson testified that "the struggle to keep the balance of power is what I think the remap was all about ." (Tr. 362.)

The City argues that Plaintiffs were treated as a group only because "the City believed that there was no authority for paying attorneys' fees for voting rights plaintiffs suing the City absent a court order." (Def. Reply, at 12.) In the City's view, Plaintiffs at best speculate that Alderman Burke denied fees based on a belief that minority aldermen are more likely to oppose the administration's positions. The City acknowledges that "the present stems from, and is conditioned by, the past," but claims that Plaintiffs have not provided the "particularized linkage required to establish a predicate of constitutional liability." (*Id.* at 12-13.) Indeed, Alderman Burke's Deputy Chief, [now Judge] Lisa Ruble-Murphy, who drew the Referendum Map, testified that she did not intend to discriminate against Plaintiffs and had no reason to believe that the purpose of the Referendum Map was to preserve a "rubber stamp" City Council. (Tr. 737, 757.) The City also notes that Judge Plunkett rejected

Plaintiffs' argument that Professor Simpson's report supports a conclusion that increased minority representation would negatively impact the Daley administration. (Def. Tr. Brief, at 7.)[5] *See Smith*, 2002 WL 1770532, at *9 (such a conclusion is "too speculative to support the inference that the City intentionally discriminated against plaintiffs to avoid it").

In this court's view, Plaintiffs have demonstrated that they were treated differently because of their membership in a group that opposed the Referendum Map espoused by the City, regardless of any alleged racial tension in the City Council. As Judge Plunkett explained,

> by showing that they all opposed the referendum map favored by the City and were all denied payment of their legal fees under the City's ordinances, plaintiffs have demonstrated that they are a class within the meaning of the equal protection clause.

Smith, 2002 WL 1770532, at *7. There can be no doubt that if Plaintiffs had sided with the Administration Aldermen on the Referendum Map and had intervened in the lawsuit to support that position, their legal fees would have been paid. This is sufficient to establish intentional discrimination based on group membership.

C. Rational Bases for Differential Treatment

The next question is whether the City had a rational basis for intentionally treating Plaintiffs differently than the other aldermen with respect to legal fees. The City offers five such

5. Defendant City of Chicago's Post-Trial Brief is cited as "Def. Tr. Brief, at __."

rational bases and claims that any one of them demonstrates that the City acted for non-discriminatory reasons. Plaintiffs argue that all of the stated explanations are a pretext for unlawful discrimination.

1. Standard of Review

Before turning to the merits of the City's rational bases, the court first addresses the proper standard for evaluating them. The City argues that to meet its burden, the City need only articulate some reason to explain its actions, regardless of whether that reason actually motivated the differential treatment. (Def. Mem., at 7-8.) Plaintiffs insist that the City must proffer evidence of its actual reasons for treating Plaintiffs differently, and that those reasons cannot be a pretext for discrimination. (Pl. Response, at 7-18; Pl. Trial Br., at 24-25.)[6] The Seventh Circuit has not squarely addressed the question of what standard is applicable to a rational basis equal protection claim challenging the enforcement of a statute, which prompted the City to seek certification of the issue for interlocutory appeal back on January 21, 2003.

In considering that motion, Judge Plunkett noted some "[d]ueling *dicta*" supporting both parties' positions. *Smith v. City of Chicago*, No. 94 C 920, 2003 WL 1989612, at *3 (N.D.Ill. Apr.28, 2003). The City's position, for example, finds support in *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277 (7th Cir.2003), in which the

6. Plaintiffs' Response in Opposition to Defendant City of Chicago's Motion for Judgment as a Matter of Law on Partial Findings is cited as "Pl. Response, at __."

plaintiff brought an equal protection challenge to a decision of the Board of Zoning Appeals ("BZA") denying the plaintiff permission to open a methadone clinic in an area zoned for doctor's offices and hospitals. A jury awarded the plaintiff more than a million dollars in damages and the BZA appealed. *Id.* at 279. The Seventh Circuit reversed the judgment, finding no evidence of discriminatory intent by the BZA. Though not called upon to define the contours of rational basis review of an equal protection challenge to the enforcement of a statute, the court nonetheless observed that "the governmental entity does not need to articulate its reasoning when the decision is made. The burden is upon the challenging party to eliminate any 'reasonably conceivable state of facts that could provide a rational basis for the classification." ' *Id.* at 282 (quoting *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)).

In other cases, however, the Seventh Circuit has taken a different approach that supports Plaintiffs' position. In *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701 (7th Cir.2002), for example, a school principal suspended two students for possessing cigarettes on school property. *Id.* at 704. One of the students committed suicide and her parents filed suit alleging, among other things, that the principal had treated their daughter differently than the other student by (1) failing to contact them at work to come pick her up, and (2) suspending her from three volleyball games and a field trip in addition to imposing a three-day suspension. *Id.* at 712. The court did not decide whether evidence of actual motivation is required for a rational basis equal protection claim challenging enforcement of a statute, but it found the

different treatment of the two students rational only after considering the school's evidence regarding the principal's motivations. *Id.* at 712-13. In Judge Plunkett's view, the case "casts doubt on the value of the *Discovery House dicta* as a predictor of the Seventh Circuit's future decisions." *Smith*, 2003 WL 1989612, at *2 (citing *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir.1982)) (examining evidence to determine that two paramedics were similarly situated and no rational reason existed for City's decision to suspend only one of them).

Judge Plunkett ultimately denied the City's motion for interlocutory appeal, explaining that resolving the issue would not materially advance the end of this litigation. He expressed the opinion, however, that "the City must proffer evidence of its actual reasons for treating the two groups of aldermen differently." 2003 WL 1989612, at *3. According to Judge Plunkett,

> the rationale underlying the hands-off approach to judicial review in facial equal protection challenges does not seem to fit enforcement claims . . . In enforcement cases, like this one, the plaintiffs are not contesting a legislative choice. They are challenging one person's enforcement of those choices.

Id. At the same time, Judge Plunkett acknowledged that allowing fact-finding in such situations "could transform the routine business of state and local government into constitutional litigation, an undesirable outcome from any perspective." *Id.*

Appendix C

In arguing that the City must present evidence of its actual motivation for treating Plaintiffs differently than the Administration Aldermen, Plaintiffs distinguish between "facial" and "as applied" constitutional challenges. Citing case law from the Eleventh Circuit, Plaintiffs argue that the rational basis test applies to facial challenges to a statute, but that "it is legal error to apply that standard in 'as applied' equal protection claims such as the case at bar." (Pl. Response, at 7) (citing *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir.1998)) (district court's use of rational basis standard was improper where complaint challenged zoning regulations as applied to plaintiff, not on their face). In Plaintiffs' view, "the use of indirect evidence to prove pretext and discriminatory intent is firmly rooted in Supreme Court precedent." (Pl. Response, at 11) (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)) (discussing "subjects of proper inquiry in determining whether racially discriminatory intent existed" in village's refusal to rezone property to a classification that would accommodate low- and moderate-income tenants). Thus, in determining whether a statute was applied in a discriminatory manner, Plaintiffs argue, the court should consider such factors as the impact of the official action, the historical background of the decision, the specific sequence of events leading up to the decision, departures from the normal procedural sequence, and departures from the normal substantive criteria. (*Id.* at 11-12) (citing *Village of Arlington Heights*, 429 U.S. at 267).

According to Plaintiffs, one case in particular "exemplifies Supreme Court and Seventh Circuit precedent

as well as Judge Plunkett's rulings and nicely recaps the[se] governing principles." (Pl. Response, at 12.) In *Pack v. Clayton County, Georgia*, No. 1:93-CV-836-RRH, 1993 WL 837007 (N.D.Ga. Aug.27, 1993), the plaintiffs sought to establish a "residential hospice" for chronically ill AIDS patients in a residential area of Clayton County. The county and certain individuals refused to give the plaintiffs a "conditional use permit" or a business license to operate the facility, so the plaintiffs filed suit under the Fair Housing Amendments Act, the Americans with Disabilities Act, and the Equal Protection clause. *Id.* at *1. Addressing all three claims together, the court set forth the traditional burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and stated:

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

1993 WL 837007, at *9 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). The court adopted the five factors for determining discriminatory intent articulated in *Village of Arlington Heights* and, finding the defendants' explanations for denying the permit "of dubious credibility," ruled in favor of the plaintiffs. *Id.* at *12, 13.

Appendix C

The City argues that *Pack* confuses the higher standard of scrutiny applicable in cases involving protected classes with the standard applicable in cases such as this, where there is no protected class. (Def. Reply, at 26.) The City also notes that by combining the analyses of the FHAA, ADA, and equal protection claims, the *Pack* court improperly imported the Title VII burden-shifting analysis into the equal protection context. (Def. Mem., at 12-13; Def. Reply, at 26) (citing *Schroeder*, 282 F.3d at 951) ("to the extent that Schroeder would like us to import Title VII employment discrimination standards into our equal protection analysis, we decline the invitation").

The court agrees that *Pack* is not particularly instructive on the issue of rational basis equal protection analysis for cases in this district that do not involve the FHAA and ADA. Indeed, the court is not aware of any non-ADA case that has cited *Pack*. Nor is the court inclined to follow Eleventh Circuit precedent that the rational basis standard does not apply to "as applied" statutory challenges at all. *See GJR Investments*, 132 F.3d at 1367. In this circuit, the proper standard is whether the City had a rational basis for its decision to treat Plaintiffs differently than the Administration Aldermen. *See, e.g., Schroeder*, 282 F.3d at 950-51. This does not mean, however, that the City can avoid liability by articulating any conceivable basis for the different treatment, even if that basis did not actually motivate the decision.

The City cites several cases for the proposition that any rational basis will do. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting *F.C.C. v. Beach Communications, Inc.*, 508

U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)) ("a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'"); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir.1995) ("[a] person challenging the regulation of economic transactions must 'negative every conceivable basis which might support' the rule"); *Illinois Health Care Ass'n v. Illinois Dep't of Public Health*, 879 F.2d 286, 288-89 (7th Cir.1989) ("[i]f the court can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action") (internal quotations omitted); *Baumgardner v. County of Cook*, 108 F.Supp.2d 1041, 1055 (N.D.Ill.2000). Plaintiffs claim these cases are inapposite because they all involve facial, as opposed to "as applied," statutory challenges. (Pl. Response, at 14-15.)

Without conceding the point, the City responds with three additional cases that address discriminatory enforcement of a statute: *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir.2002), *U.S. v. Harris*, 197 F.3d 870 (7th Cir.1999), and *Herro v. City of Milwaukee*, 44 F.3d 550 (7th Cir.1995). Those cases do not, however, establish that the City's actions must be upheld if there is any conceivable justification for Plaintiffs' differential treatment without any inquiry into the City's actual motives. In *Schroeder*, the court found no evidence of differential treatment based on the plaintiff's homosexuality, and concluded that the school district did not decline to implement a separate policy against sexual orientation due to any animus against the plaintiff or

homosexuals in general. 282 F.3d at 954. The court stated that the manner in which the school district handled the plaintiff's complaints did not deny him equal protection, using language reflecting concern for the decision-maker's actual motivation. Specifically, the court noted evidence that "the school district was genuinely concerned about the treatment Schroeder experienced, and that it did what reasonably could be expected under the circumstances." *Id.* at 956.

In *Harris*, the court upheld a peremptory challenge exercised by the government to strike a disabled juror during voir dire. The court found a rational basis for the government's decision because "its stated concern, accepted by the district court, was that she would become drowsy and would not be able to pay attention during the trial. This is a legitimate concern that is rationally related to the provision of a fair trial for Harris." 197 F.3d at 876. In *Herro*, similarly, the court accepted "the plausibility of defendants' asserted reasons" for refusing a liquor license to one applicant but granting it to another. One of the defendants, a city alderman, submitted an affidavit expressing legitimate concern about having a responsible licensee, and unlike the comparative applicant, the plaintiff did not procure the necessary work permits or submit renovation plans for his proposed tavern. 44 F.3d at 552.

In all three of these cases, the court looked to evidence of the defendants' actual motivation to determine whether they had a rational basis for the differential treatment. Like Judge Plunkett, this court believes that enforcement cases do not require the same hands-off approach to judicial review

as facial equal protection challenges because the integrity of the legislative process is not at stake. *Smith*, 2003 WL 1989612, at *3. As discussed below, however, this issue may not be dispositive; regardless of whether the City's proffered explanations for its actions actually motivated the differential treatment, Plaintiffs have demonstrated that none qualifies as a rational basis under equal protection jurisprudence.

2. Rational Bases

The City has identified five rational bases to support its actions in this case: (1) "plaintiffs were suing in their private capacity as voters to overturn a duly enacted City law, whereas defendants were — in their official capacity as aldermen — defending it"; (2) "the relevant City decision-makers reasonably believed that there was no statutory authority for-and no public purpose served by-paying from City funds the attorneys' fees of plaintiffs who were suing the City and who could be expected to be awarded fees if their case proved to have any merit"; (3) "any suggestion that the *Smith* plaintiffs were defendants and for that reason entitled, as a matter of 'fairness,' to reimbursement of their attorneys' fees was reasonably viewed as a pretext to get money to fund their suit as voters against the City"; (4) "the City was within its rights to pay the attorneys' fees of the aldermen who defended the map ordinance because they agreed with the City's own position in the litigation that the map was lawful, and the City was not obligated to remain neutral in this dispute or to refrain from exercising its speech rights-be it through direct speech or funding the party it favored in the litigation-in support of its own legislation"; and (5) "funding the aldermen plaintiffs in the remap litigation could itself give rise to an equal protection claim because it did not

fund other plaintiffs in parallel suits contesting the City's map." (Def. Mem., at 8.) The court addresses each in turn.

a. Voters Versus Aldermen

The City first argues that it rationally denied Plaintiffs' request for attorneys' fees because they sued the City as voters, and only aldermen are eligible for such payments. (Def. Reply, at 18-19.) *See, e.g.*, Municipal Code § 2-152-170. As noted earlier, this argument fails to explain the City's refusal to reimburse Plaintiffs even for the legal expenses they incurred when named as defendants in the *Barnett* case. *See infra*, at 27-29. In addition, nothing in the ordinances conditions payment on standing to sue as an official, or precludes payment whenever an alderman is wearing two hats (e.g., alderman and voter). *See, e.g.*, § 2-152-170 (allowing appointment of counsel to defend any "claim [that] arises out of any act or omission, made in good faith, occurring within the scope of [an official's] office or employment"). Moreover, Alderman Burke testified that his unwillingness to appoint counsel for Plaintiffs in the remap litigation was not based on the fact that the litigation involved voting rights. (Tr. 509.) Thus, the mere fact that the Opposition Aldermen were also voters in the remap litigation does not demonstrate that the City acted rationally in refusing to pay Plaintiffs' legal fees.

b. Statutory Authority

The City next points to Alderman Burke's February 16 and March 16, 1993 letters to Alderman Bloom (which were apparently drafted by Lisa Ruble-Murphy). (Def. Reply, at

18; Tr. 777-78.) In his February 16 letter, Alderman Burke stated that "there is no basis in the Municipal Code of the City of Chicago to . . . authorize the payment of legal fees for those persons [who sue the City]," and that,

> Section 2-152-170 of the Municipal Code authorizes the payment of legal fees for City officials when an action has been brought against them for activities performed in the course of their employment. This Section does not authorize the payment of legal fees for those persons bringing the action.

(PX 29.) Alderman Burke's March 16 letter similarly explained, "I have not found any language in the Municipal Code to authorize the Committee on Finance to pay the fees of outside lawyers hired to sue the City of Chicago, its officials and employees." (PX 30.)

The court is not persuaded that Alderman Burke's letters provide a rational basis for the City's decision not to pay Plaintiffs' legal expenses. It is undisputed that the City paid such expenses on behalf of the *Roti* aldermen when they sued the City, and that Lisa Ruble-Murphy was aware of that fact when she drafted Alderman Burke's letters to Alderman Bloom. (Tr. 777.) The City's plaintiff/defendant distinction is, thus, unavailing. For the reasons already explained, the fact that Plaintiffs were also suing as voters similarly fails to explain the City's decision to pay the *Roti* plaintiffs' attorneys' fees but not those of Plaintiffs in this case. Indeed, Alderman Burke's February 16 and March 16, 1993 letters never mentioned, much less attempted to distinguish, the *Roti*

cases. Nor is the differential treatment between the Opposition Aldermen, who were plaintiffs in *Smith I*, and the Administration Aldermen, who intervened in that case, justified because Plaintiffs were opposing the Referendum Map. As Judge Plunkett noted, "[t]hat explanation-we only pay the legal fees of aldermen-plaintiffs if we deem the cause worthy-is virtually an admission that the City does not apply the fee payment ordinances in a content-neutral fashion." *Smith*, 2002 WL 1770532, at *11. Significantly, Alderman Preckwinkle testified that Alderman Burke expressly agreed to consider paying Plaintiffs' legal fees if they would settle with the City. (Tr. 85-86, 90.)

Similarly unavailing is the City's suggestion that the availability of attorneys' fees to Plaintiffs if they prevailed in the remap litigation distinguishes them from the *Roti* plaintiffs, who did not have such fees available to them. In the event Plaintiffs lost, the City had no intention of paying any of their attorneys' fees though reimbursement would not have been available to them as prevailing parties. On the other hand, the City was willing to pay the *Roti* plaintiffs' expenses both when they prevailed in *Roti I* and when they lost in *Roti II*. (Tr. 19-20.) As for any concern about double recovery in the event Plaintiffs won the remap litigation, there can be little doubt that the City would only have been required to reimburse those expenses that it had not yet paid.

The City claims that in light of *Kinzer v. City of Chicago*, 169 Ill.App.3d 447, 120 Ill.Dec. 8, 523 N.E.2d 919 (1st Dist.1988), *aff'd in part and rev'd in part*, 128 Ill.2d 437, 132 Ill.Dec. 410, 539 N.E.2d 1216 (1989), its unwillingness to pay Plaintiffs' legal fees was borne of concern about a

possible taxpayer action for recovery of funds that were improperly expended by the City. (Def. Tr. Brief, at 13.) In *Kinzer*, a taxpayer sued the city and its comptroller for expending funds "without an appropriation being made therefor by the city council." *Id.* at 449, 120 Ill.Dec. 8, 523 N.E.2d at 920. Specifically, the comptroller created a special fund to pay for a festival called "ChicagoFest," which created liabilities against the city's general fund that had not been approved by the City Council. *Id.* The court found that this was unlawful: "Since Fund 666 is not a special one, its contrivance by administrative officials made any moneys therein, perforce, part of the general funds of the City, and any expenditures from the fund were legally required to be made only through the appropriations process." *Id.* at 455, 120 Ill.Dec. 8, 523 N.E.2d at 924. *Kinzer* is easily distinguishable from this case because the City did make a prior appropriation for payment of legal fees and, moreover, used those appropriations to reimburse the Administration Aldermen. Any claimed concern about a taxpayer lawsuit under such circumstances is without merit.

The City next argues that a government has a right not to remain neutral in litigation relating to its laws. (Def. Reply, at 22) (citing *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)) ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Plaintiffs did not, however, ask the City to remain neutral in the litigation, much less support their viewpoint; they simply asked that the fee payment ordinances be applied in a consistent manner. Contrary to the City's suggestion, the City is not, as a general principle, required

to "underwrite each and every lawsuit that challenges a City law." (Def. Reply, at 22.) Indeed, as written, § 2-152-170 applies only where an action is instituted *against* an alderman.[7] Regardless of the ordinance's "proper" interpretation, however, the City, which voluntarily chose to reimburse the *Roti* aldermen notwithstanding their status as plaintiffs, and to reimburse the Administration Aldermen when they voluntarily intervened in the remap litigation, must now live with those decisions and treat other plaintiff-aldermen in like fashion. *See Smith*, 2002 WL 1770532, at *8 ("the question is not whether the City's interpretation is correct, but whether the City adheres to that interpretation, regardless of the . . . political views of the official seeking payment of legal fees").

c. "True" Defendant Status

The City acknowledges that Plaintiffs were named as defendants in *Barnett* but argues that they were not truly acting as defendants in that litigation. "[T]he actions taken by the *Smith* plaintiffs during [the time they were defendants] were not the actions of a true defendant, but rather were part of a sham defense." (Def. Reply, at 20; Def. Mem., at 9.) Once again, this argument ignores the fact that the City paid the legal expenses of the *Roti* aldermen when they were acting

7. Plaintiffs have offered some evidence that the City paid the legal expenses in *Roti* and certain other cases from sources besides § 2-172-150, and argues that the City similarly could have paid Plaintiffs' legal fees from those other sources. (Plaintiffs' Post-Trial Memorandum (hereinafter "Pl. Tr. Brief"), at 48-58.) Given the City's exclusive reliance on that statute, and given the court's conclusion that the City applied § 2-172-150 unequally with respect to Plaintiffs, the court need not consider other potential sources of payment.

as plaintiffs and of the Administration Aldermen when they intervened in *Smith I*. In addition, the court is not persuaded by Lisa Ruble-Murphy's testimony that she did not believe Plaintiffs were entitled to reimbursement because "[t]here was no way that Mr. Miner was defending the Referendum Map." (Tr. 747-48.) Ruble-Murphy also testified that she knew the *Roti* aldermen had received reimbursement when they were acting as plaintiffs. (Tr. 777.) To the extent Ruble-Murphy believed Plaintiffs could only be reimbursed if they supported the City's position on the Referendum Map, (Def. Reply, at 20), she is essentially admitting that the City applied the fee payment ordinances unequally, supporting only those causes it deemed "worthy." *See Smith*, 2002 WL 1770532, at *11.

d. Equal Protection Liability

The City finally urges that if it had funded Plaintiffs in the remap litigation, the *Barnett* and *Bonilla* plaintiffs could have asserted equal protection claims unless the City similarly funded their lawsuits. (Def. Reply, at 22.) This argument is a non-starter. None of the other plaintiffs in *Barnett* or *Bonilla* was also an alderman even arguably eligible for reimbursement under the relevant fee payment ordinances. In other words, the *Barnett* and *Bonilla* plaintiffs were not similarly situated to Plaintiffs for purposes of asserting an equal protection claim based on the non-payment of aldermanic legal fees. *See Schroeder*, 282 F.3d at 950.

Appendix C

3. Rational Bases-Aldermen Watson, Munoz, Haithcock, and Garcia

The City insists that it treated Aldermen Watson, Munoz, Haithcock, and Garcia fairly with respect to attorneys' fees because it treated them the same as all the other Plaintiffs. (Def. Reply, at 23.) Because the City's arguments for denying all Plaintiffs their fees fail, for the reasons already stated, this argument also fails. The City argues that Alderman Burke provided a rational basis for denying the fees of Alderman Munoz; namely, he was not a member of the City Council at the time of the redistricting process. (Def. Reply, at 24; Tr. 372-73.) The problem with this argument is that Alderman Burke did not give a similar explanation to Alderman Watson. (PX 32, Letter from Burke to Watson of 3/16/93) (§ 2-152-170 "authorizes appointment of private counsel only to defend against an action brought against an official or employee"). Nevertheless, to this court's knowledge, Aldermen Watson and Munoz never actually joined the remap litigation and never incurred any attorneys' fees in that regard. Accordingly, they are entitled only to nominal damages. To the extent Plaintiffs failed to offer any evidence at all regarding Alderman Haithcock, her request for relief is denied.

With respect to Alderman Garcia, the City did agree to pay part of his legal fees. (Tr. 757-58.) The City declined to reimburse $7,000 in additional fees, however, on the basis that the work was being done as a sham defense while Alderman Garcia was acting as a plaintiff. (Tr. 758.) The court has already rejected this distinction and finds that Alderman Garcia was treated unequally with respect to the payment of his attorneys' fees in this case and is entitled to reimbursement.

Appendix C

III. Relief

Plaintiffs seek to recover $246,354.07 in unpaid legal expenses. (Pl. Tr. Brief, at 65-72.) The City does not respond to Plaintiffs' itemization other than to argue elsewhere in its briefs that the City should not have to reimburse expert fees because it did not share experts in common with Plaintiffs. (Def. Mem., at 3.) It is undisputed that the Administration Aldermen's counsel paid for the experts and then obtained reimbursement from the City. (Tr. 584-85.) The court sees no reason why Plaintiffs should not be similarly reimbursed for their expert fees. Plaintiffs' request for $246,354.07 in unpaid legal expenses is granted. Alderman Garcia is entitled to recover $7,000.00. Aldermen Watson and Munoz, in turn, are entitled to nominal damages.

CONCLUSION

For the reasons stated above, the City's Motion for Judgment as a Matter of Law on Partial Findings (Docket No. 206-1) is denied and judgment is entered in favor of Plaintiffs in the amount of $246,354.07.

Dated: June 10, 2004

ENTER:
s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED JUNE 10, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 94 C 920

Ed H. Smith, et al

v.

City of Chicago

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the City's motion for judgment as a matter of law on partial findings is denied and judgment is entered in favor of Plaintiffs in the amount of $246,354.07.

Michael W. Dobbins, Clerk of Court

s/ Ena T. Ventura

Ena T. Ventura, Deputy Clerk

Date: 6/10/2004

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED JULY 31, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 94 C 920
Paul E. Plunkett, Senior Judge

ED SMITH, et al.,

Plaintiffs,

v.

THE CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs, twenty-three current or former aldermen of the City of Chicago, have sued the City for its alleged violations of their First and Fourteenth Amendment rights. The case is before the Court on the City's Federal Rule of Civil Procedure 56(c) motion for summary judgment and its motion to strike portions of plaintiffs' submissions. For the reasons set forth below, the summary judgment motion is granted in part and denied in part as to the claims that are justiciable and denied as to the claims that are not, which

are dismissed for lack of subject matter jurisdiction. The City's motion to strike is dismissed as moot.

Facts[1]

In 1991, the Chicago City Council was required by law to draw a new map of the ward boundaries. (Def.'s LR 56.1(a) Stmt. ¶ 5.) The council members could not agree on a map, however, so twenty-eight aldermen, nearly all of whom are white and sympathetic to the Daley administration ("the administration aldermen"), submitted a proposed map for a referendum vote. (*Id.*; Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 4.) Another group of aldermen, nearly all of whom are African American and plaintiffs in this case ("the opposition aldermen"), submitted an alternate proposed map. (Def's LR 56.1(a) Stmt. ¶ 5; Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 5.) On March 17, 1992, City voters approved the map submitted by the administration ("the referendum map"). (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 14.)

Three lawsuits ensued: (1) *Barnett v. Daley*, which was filed by several African-American voters who claimed, among other things, that the referendum map violated the Voting Rights Act (Def's LR 56.1(a) Stmt. ¶ 6); (2) *Smith v. Daley*, which was filed by the plaintiffs in this case who asserted a Voting Rights Act claim on behalf of all African-American residents of the City (*id.*, ¶ 7); and (3) *Bonilla v. City Council of the City of Chicago*, which was filed by several Latino voters who claimed that the referendum map violated their rights (Def's LR 56.1(a) Stmt. ¶ 8). Though they were later dismissed from the suit, all of the City's

1. Unless otherwise noted, these facts are undisputed.

aldermen were named as defendants in *Barnett*. (*Id.* ¶ 6; Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 21.) None of the aldermen was named as a defendant in either *Smith* or *Bonilla*. (Def.'s LR 56.1(a) Stmt. ¶¶ 7, 8.)

Both the administration aldermen and the opposition aldermen retained private counsel to represent them in the *Barnett* suit. (Pls.' LR 56.1(b)(3)(B) Stmt. ¶¶ 16-18.) The City paid the attorneys' fees of the administration aldermen, both when they were defendants in that suit and later, when they voluntarily intervened in it. (*Id.* ¶¶ 20-21.) The City also paid the administration aldermen's legal expenses when they intervened in *Smith* and *Bonilla*, the cases in which they had not been named as defendants. (*Id.* ¶ 36; Def's LR 56.1(a) Stmt. ¶ 10.)

The City did not pay any of the legal expenses incurred by the opposition aldermen in *Barnett*, even those that were incurred when the aldermen were defendants in the suit. (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 22.) Moreover, the City rejected the requests of plaintiffs Munoz, Watson and Haithcock, who became aldermen in 1993, to reimburse any legal expenses they might incur if they intervened in the remap suits. (*Id.* ¶ 36.)

The City's proffered reason for refusing to make those payments was that "there is no basis in the Municipal Code of the City of Chicago to . . . authorize the payment of legal fees for those persons [who sue the City]." (Exs. Pls. Mem. Law Opp'n Def's Renewed Mot. Summ. J., Tab B, No. 6, Pls.' Ex. 29, 2/16/93 Letter to Bloom from Burke; *see id.*, Tab B, No. 7, Pls.' Ex. 30, 3/16/93 Letter to Bloom from

Burke ("I have not found any language in the Municipal Code to authorize the Committee on Finance to pay the fees of outside lawyers hired to sue the City of Chicago, its officials and employees,"); *id.* Tab B, No. 9, Pls.' Ex. 32, 3/16/93 Letter to Watson from Burke (stating that section 2-152-170 of the Chicago Municipal Code "authorizes appointment of private legal counsel only to defend against an action brought against an official or employee."); Pls.' LR 56.1(b)(3)(B) Stmt.¶ 38.[2]) The City, however, paid the legal expenses incurred by the administration aldermen when they sued the City over council voting procedures when Harold Washington was mayor. (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 39(4).[3]) Moreover, the City's budget ordinance for the last ten years has contained at least five different line items for legal assistance or services to the City Council and three "finance general" line items pertaining to professional services, from which the administration aldermen's legal expenses for the *Smith* and *Barnett* cases were paid. (Pls.' LR 56.1(b)(3) (B) Stmt, ¶¶ 42, 44, 45; Def.'s Resp. Pls.' LR 56.1(b)(3)(B), Ex. B, Steve Hughes Aff. ¶ 3.)

Ultimately, the City prevailed in *Bonilla* and the parties to *Smith* and *Barnett* entered into a consent decree that modified the referendum map, (Def.'s LR 56.1(a) Stmt. ¶¶ 11-12.) The court ruled that the *Smith* and *Barnett* plaintiffs had prevailed, within the meaning of 42 U.S.C. § 1988, and awarded them more than $8 million in fees and costs. (*Id.* ¶¶

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2. The City denied the facts asserted by plaintiffs in this paragraph without any citation to the record. By operation of Local Rule 56.1, therefore, the City is deemed to have admitted them.

3. *See* n.2.

13-17.) Plaintiffs contend, however, that the fee award did not include approximately $300,000.00 of fees and costs they incurred in those suits.

In this suit, plaintiffs claim that the City's failure to pay their legal expenses violated their First and Fourteenth Amendment rights. They seek damages, a declaration that the City's conduct violated their rights and present and future injunctive relief. The City contends that this case no longer constitutes a justiciable controversy and, even if it does, it fails on the merits,

The Legal Standard

To prevail on a summary judgment motion, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). At this stage, we do not weigh evidence or determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), We view all evidence and draw all inferences in favor of the non-moving party. *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 692 (7th Cir. 2000), Summary judgment is appropriate only when the record as a whole establishes that no reasonable jury could find for the non-moving party. *Id.*

Appendix E

Discussion

Motion to Strike

The City moves to strike: (1) the portions of plaintiffs' brief and LR 56.1 fact statements that rely on Professor Dick Simpson's testimony about the City's motives for its conduct; and (2) the references in their brief to statements the City allegedly made during settlement negotiations. As the City points out, the Court previously ruled that Professor Simpson was not competent to provide motive testimony, (*see* Exs. Supp. Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ. J, Tab G, 4/9/98 Order at 13-14), and statements made during settlement negotiations are inadmissible, *see* Fed. R. Evid. 408. The Court did not, however, consider either Professor Simpson's motive testimony or the settlement negotiation statements in deciding the summary judgment motion. The City's motion to strike, is therefore, dismissed as moot.

Summary Judgment Motion

The City contends that this case is moot because the fee award in the remap cases provided plaintiffs all of the relief they request. The Court disagrees. There is no dispute that the City paid most of plaintiffs' legal expenses pursuant to the fee award in *Barnett* but, viewed favorably to plaintiffs, the record suggests that the following amounts remain unpaid: $179,418.07 in expert witness fees (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 86), $100,842.50 in additional legal fees (*id.* ¶¶ 87-88, 90-91) and $937.50[4] in additional costs (*id.* ¶ 89).

4. In their statement of additional facts, plaintiffs state that the amount of unpaid costs is $999.50. (*See* Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 89 (citing *Barnett v. City of Chicago*, No. 92 C 1683, 1993 WL 138813, at *4-6 (N.D. Ill. Mar. 5, 1999).) According to the Court's calculations, however, the actual amount of unpaid costs is $937.50.

The expert fees and additional costs are not actually in dispute, the City says, because plaintiffs have not made a claim for them in their complaint. While that is true, it is not a fatal defect. Federal Rule of Civil Procedure 15(b) permits the Court to consider evidence on issues not raised in the pleadings if doing so helps to resolve the merits of the case and does not prejudice the opposing party. The basis for plaintiffs' expert fees and costs claims — that the City unconstitutionally preferred one group of aldermen over the other — is the same as the basis for their fees claims. Thus, evidence pertaining to the expert fees and costs bears directly on the merits of the case. Moreover, the City has had this evidence for years (Def.'s Resp. Pls.' LR 56.1(b)(3)(P) Stmt. ¶ 86), so it will not be prejudiced if the Court considers it in connection with the summary judgment motion. In short, the expert fees and additional costs are in dispute in this case, a dispute that was not mooted by the *Barnett* fee award.

The City also contends that there is no live controversy over the additional legal fees. Plaintiffs may not recover the $44,000.00 they spent on pre-litigation activities, the City says, because they made no claim for them in their complaint and, in any event, the City did not pay for pre-litigation services rendered by counsel for the administration aldermen. In the City's view, the $34,442.50 loss that resulted from the *Barnett* court's reduction of plaintiffs' counsel, Judson Miner's, billing rate is also not at issue. That rate adjustment "is not an injury," the City says, but "a market reality." (City of Chicago's Reply Br. Supp. Renewed Mot. Summ, J. at 3.) The City also discounts plaintiffs' claim for the $15,000.00 that Mr. Miner agreed to forego to foster settlement of the remap cases because he "cannot now rescind his word." (*Id.*)

Similarly irrelevant, in the City's view, is the $7,000.00 allegedly owed to Matthew Piers, former Alderman Garcia's attorney. Mr. Piers has waived his rights to recover that sum, the City says, by failing to continue to ask for its payment after the City rejected his initial requests.[5] (*Id.* at 3-4.)

The City's argument, in essence, is that there is no controversy over these additional fees because plaintiffs are not entitled to recover them. That may be true, but it does not mean that the dispute over them has ended. "A case is moot if there is no possible relief which the court could order that would benefit the party seeking it." *United States v. Balint*, 201 F.3d 928, 936 (7th Cir. 2000) (internal quotation marks and citation omitted). Unless Mr. Miner and Mr. Piers have completely absolved plaintiffs of their obligation to pay these fees, awarding those amounts to plaintiffs or enjoining the City to pay their counsel are potential forms of relief that would benefit plaintiffs.[6]

Even if plaintiffs did suffer some injury, the City contends that it is not substantial enough to support a constitutional claim. Once again, the Court disagrees. "The maxim *de minimis non curat lex* . . . place[s] outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be

5. Apparently, filing a lawsuit to recover these fees does not, in the City's eyes, constitute a demand for payment,

6. The City's payment of the administration aldermen's legal fees for the remap cases has, however, mooted plaintiffs' requests for an injunction prohibiting the City from making those payments. (*See* Compl. ¶¶ 73B, 78B, 83B, 87B, 92B.)

accepted as the price of living in society. . . ." *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). It is not the size of an injury that animates the *de minimis* doctrine, our court of appeals explained, but its amorphousness:

> [I]f a loss is not only small but also indefinite, so that substantial resources would have to be devoted to determining whether there was any loss at all, courts will invoke the *de minimis* doctrine and dismiss the case, even if it is a constitutional case. . . . The maxim's design is to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors. It has little or no proper application to cases in which the monetary cost of the loss is, though tiny, readily determinable.

Hessel v. O'Hearn, 977 F.2d 299, 303 (7th Cir. 1992) (internal quotation marks and citations omitted). The monetary loss claimed here is both substantial and readily determinable. Accordingly, the de *minimis* doctrine, as described in *Hessel*, does not apply.

Indefinable injuries are not, however, the only ones to which the *de minimis* label is applied. It is also used "to denote types of harm, often but not always trivial, for which the courts do not think a legal remedy should be provided." *Id.* at 304. Such was the case in *Swick*, in which the court said that "[t]he [non-pecuniary] injury that results when a person is temporarily deprived of his right to wear a uniform and a badge, to carry a gun, to arrest people, and to carry out

other functions of a police officer" is not a deprivation of property within the meaning of the Fourteenth Amendment. 11 F.3d at 87. Unlike that alleged in *Swick*, the injury alleged here, which results from intentional discrimination based on race and political viewpoint, is not too trivial to merit legal redress. *See Hessel*, 977 F.2d at 304 (noting that the *de minimis* doctrine has "little if any application to deliberate wrongs"). Thus, the *de minimis* doctrine does not doom plaintiffs' claims.

The next arrow in the City's quiver is standing. Plaintiffs have standing to pursue their claims if they have suffered, or imminently will suffer, an injury to a legally protected interest that can be traced to the City and is likely to be redressed by a decision in their favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even if the outstanding fees and costs constitute an actionable injury, the City says, it is one that was suffered by plaintiffs' lawyers, not by plaintiffs themselves. Consequently, plaintiffs have no standing to sue for those amounts.

There is no dispute that Mr. Miner, who represented the bulk of the plaintiffs in the *Barnett* suit, did so "on a purely contingent basis." (Exs. Def.'s Mem. Law Supp. Renewed Mot. Summ. J., Ex. 18, *Barnett* Pls.' Pet. Atty's' Fees & Costs, Ex. 1, Miner Decl. ¶ 13; Def.'s LR 56.1(a) Stmt. ¶ 27; Pls.' LR 56.1(b)(3)(A) Stmt. ¶ 27.) Plaintiffs have offered no evidence to suggest that they remain, despite Mr. Miner's description of their financial arrangement, liable for some or all of the fees and expenses that remain unpaid. Absent such evidence, plaintiffs have not demonstrated that they were injured by the City's failure to pay Mr. Miner's bills.

Thus, they have no standing to pursue their claims to recoup the amounts owed to him.

The same is not true, however, of plaintiff Garcia's claim for the $7,000.00 allegedly owed to his lawyer, Mr. Piers. There is no evidence that Mr. Piers has fully absolved Mr. Garcia, through a contingency agreement or otherwise, of his obligation to pay those outstanding fees. Accordingly, we must draw the reasonable inference that Mr. Piers expects payment from his client for the services he rendered. Therefore, plaintiff Garcia has standing to pursue his claim for the money owed to Mr. Piers.

Even if they do not have standing to seek monetary relief, plaintiffs contend that their First Amendment claims for injunctive and declaratory relief remain viable. (*See* Compl. ¶¶ 73A, 83A (seeking declaration that the City's conduct violated their First Amendment rights); *id.* ¶¶ 73C, 83C (seeking injunction requiring the City to pay legal fees they incurred in the remap cases).) The injury that plaintiffs say support these claims is the chilling effect the City's conduct has had on their freedom of speech. (Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ. J. at 21.) There is, however, no evidence to suggest that any chilling occurred. The City's failure to subsidize plaintiff s speech did not prevent them from participating, indeed prevailing, in the remap suits.[7] Moreover, there is no evidence that the City's conduct caused

7. Though the the City refused to appoint counsel for plaintiffs Haithcock, Watson and Munoz, to intervene in the remap suits, (*see* Pls.' LR 56.1 (b)(3)(B) Stmt. ¶¶ 31-35), there is no evidence that the City's failure to do so prevented them from participating in those suits.

any of the plaintiffs to refrain from speaking out about redistricting or inhibited them in any way from expressing their views on any other topic. The only evidence plaintiffs have offered on the alleged "chill" is Alderman Preckwinkle's testimony that the City's actions "would make [her] think twice" about engaging in a redistricting battle in the future. (Exs. Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ. J., Tab A, No. 12, Preckwinkle Dep. at 74) That statement, however, is speculation about possible future injury, not evidence of a present one. As such, it does not give Alderman Preckwinkle, let alone the other plaintiffs, standing to pursue their First Amendment claims for declaratory and injunctive relief. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.")

Plaintiffs seek similar relief for their Fourteenth Amendment claims. (*See* Compl, ¶¶ 78A, 87A, 92A (seeking declaration that the City's conduct violated their Fourteenth Amendment rights); *id.* ¶¶ 78C, 87C, 92C) (seeking injunction requiring the City to pay the legal fees incurred by the plaintiffs in the remap cases).) The injury that supports those claims, plaintiffs say, is the City's failure to treat them equally under the ordinances that permit payment of aldermanic legal fees because of their political views and race. This time plaintiffs are on solid ground. With respect to their claims that the City denied them equal treatment because of their race, that discrimination itself is sufficient injury to confer standing for an equal protection claim. *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[D]iscrimination itself, by perpetuating archaic and

stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore less worthy participants in the political community can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (internal quotation marks and citation omitted), Moreover, as the *Heckler* Court observed, "when the right invoiced is that of equal treatment, the appropriate remedy is a mandate of equal treatment." *Id.* at 740 (internal quotation marks, emphasis and citation omitted). Thus, plaintiffs' injury can be redressed by an injunction requiring the City to pay their attorneys' fees in the remap cases. Plaintiffs, therefore, have standing to seek injunctive relief for the City's alleged racial discrimination.

They also have standing to pursue injunctive relief for their claims that the City denied them equal protection because of their opposition to the referendum map. The City's alleged refusal to pay plaintiffs' legal fees pursuant to its ordinances forced them to file this suit, a burden not shared by the aldermen whose redistricting views the City favored, The unequal treatment under the ordinances coupled with the burden of having to litigate to vindicate their rights is sufficient injury to confer standing for those equal protection claims. *Sherwin Manor Nursing Ctr. Inc. v. McAuliffe*, 37 F.3d 1216, 1221-22 (7th Cir. 1994) (state surveyors' false report about condition of nursing home, which required the home to engage in additional administrative processes to retain its certification, was sufficient injury to confer standing for equal protection claim). Moreover, an injunction requiring the City to pay the legal fees plaintiffs incurred in both the remap suits and this one would redress that injury. Thus,

plaintiffs have standing to pursue their speech-based equal protection claims.

Plaintiffs do not, however, have standing to seek an injunction barring the City from treating them unequally in the future. Plaintiffs' standing to seek an injunction against future conduct cannot be premised on "[p]ast exposure to illegal conduct," *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974), or "hypothetical speculation and conjecture that harm will occur in the future," *Palmer v. City of Chicago*, 755 F.2d 560, 571 (7th Cir. 1985). Rather, plaintiffs have such standing only if they can demonstrate that there is a real and immediate threat that they will be denied equal treatment in the future under the ordinances pertaining to payment of aldermanic legal fees. *See, generally City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Plaintiffs have not made the requisite showing. They have not identified any pending or threatened litigation that pits them against the administration or any political issue that does so and is likely to erupt in litigation. Instead, they argue that their historical antagonism to the administration's agenda and the City's failure to treat them equally in the remap cases warrants an injunction ordering the City to treat them fairly in the future. The City's past conduct and plaintiffs' speculation as to future events do not, however, amount to a real and immediate threat that the City will apply the legal fees ordinances unequally in the future. Plaintiffs do not, therefore, have standing to seek future injunctive relief.

Nor do they have standing to seek declaratory relief for their equal protection claims. Though plaintiffs have suffered a concrete injury, a declaration that the City's failure to pay their legal fees violated their equal protection rights would do nothing to redress it. Because the declaratory relief plaintiffs seek would not redress the injury they claim to have suffered, they have no standing to pursue it.[8]

We turn now to the merits of plaintiffs' equal protection claims. To prevail on those claims, plaintiffs must show that: (1) they are members of a protected class; (2) the City treated them differently than similarly situated aldermen outside of the protected class; (3) and it did so intentionally because of plaintiffs' membership in the protected class. *Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990).[9] The City contends, with respect to plaintiffs' speech-based claim,[10] that there is no evidence that plaintiffs constitute an identifiable class. As plaintiffs admit, they do not always vote identically and not all of them oppose the administration at every turn. Thus, the City says, they are not a "class" within the meaning of the equal protection clause.

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8. As the Seventh Circuit made clear in *Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000), the redressability component of the *Lujan* standing formulation applies to claims for declaratory relief. Because none of the cases cited by plaintiffs discusses redressability, they are inapposite.

9. The City does not argue that the requisites for municipal liability under 42 U.S.C. § 1983 are not met.

10. The City contested the class element of plaintiffs' race-based equal protection claim for the first time in its reply brief. The argument is, therefore, waived.

Appendix E

The City's definition of class is too narrow. Plaintiffs do not have to be a cohesive group at all times or for all purposes to have a viable equal protection claim. As the Seventh Circuit has recognized, a class for equal protection purposes "can be defined by reference to the discrimination itself." *Indiana State Teachers Ass'n v. Board of Sch. Comm'rs of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996). Thus, by showing that they all opposed the referendum map favored by the City and were all denied payment of their legal fees under the City's ordinances, plaintiffs have demonstrated that they are a class within the meaning of the equal protection clause.

Even if they are a class, the City contends that there is no evidence that plaintiffs were situated similarly to the administration aldermen. Though all of the aldermen were sued in *Barnett*, the City says plaintiffs were defendants in name only. Because their interests were aligned with those of the *Barnett* plaintiffs, plaintiffs were, in essence, suing the City. The ordinances governing the payment of aldermanic legal fees, the City says, only authorize payments to aldermen who are defending the City's interests, not to those who are plaintiffs or nominal defendants in suits against the City. It is that distinction, the City argues, that immunizes its dissimilar treatment of the two groups of aldermen.

As plaintiffs point out, neither of the ordinances pursuant to which the administration aldermen's fees were paid mentions the nominal/actual defendant distinction drawn by the City. The first ordinance ("the fees ordinance") permits fees to be paid to defend an alderman against a claim or action instituted against him. (Exs. Defs.' Mem, Law Supp. Defs.'

Renewed Mot. Summ. J., Ex. 1, Compl., Ex. A, Chicago Municipal Code § 2-152-170.) It says nothing, however, about nominal defendants or "true" party alignment.

Nor does the second ordinance ("the budget ordinance"), which is nothing more than a series of line items with terse descriptions. In fact, the budget ordinance, which contains such line items as;

> (1) 15/2005.9010, for legal and other incidental contractual services, to be expended at the direction of the chairman of the finance committee;
>
> (2) 15/2010.9005, for the payment of legal fees pursuant to the fees ordinance, to be expended at the direction of the chairman of the finance committee;
>
> (3) 15/2010.9006, legal assistance to the council, to be expended at the direction of the chairman of the finance committee;
>
> (4) 15/2010.9010, for legal and other services, to be expended at the direction of the chairman of the finance committee;
>
> (5) 15/2010.9073, for contingent expense authorized by the chairman of the finance committee;
>
> (6) 99/2005.0140, finance general, other operating expenses, professional and technical services;

> (7) 99/2005.0931, finance general, payment of non-tort judgments and other legal expenses; and
>
> (8) 99/2005.9007, finance general, ward remap studies and costs (Exs. Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ, J., Tab B, No, 4, Pls.' Ex 19b at 18, 20, 22)

says nothing at all about the nature of the claims or proceedings for which legal fees may be paid.

The plain language of these ordinances casts some doubt on the validity of the City's interpretation. But the question is not whether the City's interpretation is correct, but whether the City adheres to that interpretation, regardless of the race or political views of the official seeking payment of legal fees. Viewed favorably to plaintiffs, the record suggests that the City does not.

It is undisputed that during the administration of Harold Washington, a group of aldermen, some of whom are administration aldermen, twice filed suit against the mayor over the validity of certain city council procedures and resolutions. (*See Roti v. Washington*, 450 N.E.2d 465 (Ill. App. Ct. 1983) ("*Roti I*"); Exs. Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ, J., Tab B, No. 20, *Roti v. Washington*, 500 N.E.2d 463 (111. App. Ct. 1986) ("*Roti II*".) In both cases, the suing aldermen were represented by William Harte, who submitted his bills to the finance committee and received payment for them from a line item in the budget ordinance attributed to the city council and its committees. (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 65.) In other words, contrary to the

City's contention, the record suggests that it twice paid, pursuant to one of the ordinances identified by plaintiffs, the legal fees of certain aldermen who sued the City.

But proof of dissimilar treatment alone will not defeat the City's motion. To do so, plaintiffs must also show that the City chose to treat them less favorably than it treated the aldermen-plaintiffs in *Roti* because of their race or political views. *Sims*, 902 F.2d at 538. As evidence of discriminatory intent, plaintiffs offer the testimony of Professor Simpson, Alderman Bloom and former Alderman Rush, that minority and opposition aldermen are not appointed to chair city council committees and do not have ready access to certain City services or to discretionary job placements within Chicago city government, (Pls.' LR 56.1(b)(3)(B) Stmt. ¶ 39(5).[11]) Those facts, however, only support an inference of discrimination if the minority and opposition aldermen were otherwise qualified for, or entitled to, the chairmanships, services and job placements and the decisions to withhold those benefits from them were made by the same person or people who refused to pay plaintiffs' legal fees. There is no evidence to suggest that such is the case. In fact, the record says nothing at all about: (1) who selects committee chairs and the criteria used to make those selections; (2) the specific City services to which minority and opposition aldermen do not have ready access, who controls those services and what criteria are used to determine who will receive them; and (3) who awards discretionary job placements and the criteria

11. Plaintiffs also cite to Alderman Shaw's testimony in paragraph 39(5), but his examples of discriminatory treatment all relate to the City's failure to pay plaintiffs' legal fees in the remap cases.

used to do so. Absent such evidence, the fact that minority and opposition aldermen have not received certain benefits they have sought or to which they feel they are entitled does not support an inference of discriminatory intent,

Plaintiffs also contend that the data in Professor Simpson's expert report constitutes evidence of the City's discriminatory intent. Professor Simpson analyzed voting patterns in the Chicago City Council for the years 1989 through 1994. He concluded that the administration aldermen supported Mayor Daley on more than 90% of divided roll call votes, while plaintiffs did so less than half the time. (Exs. Supp. Pls.' Mom. Law Opp'n Def's Renewed Mot. Summ. J., Tab G, Simpson Rep. at 3-7.) He also said that there is a correlation between the race of the aldermen and their voting patterns: the white aldermen tend to support the administration while the minority aldermen do not. (*Id.* at 3.) Based on those facts, and the historical impact of ward remapping, Professor Simpson concluded that increasing minority representation in the council would weaken Mayor Daley's control of the council because "minority aldermen have a strong probability of joining and supporting the independents or Opposition bloc." (*Id.* at 9.)

This data, plaintiffs contend, suggest that the City intentionally discriminated against them because they supported a ward map that would increase minority representation in, and reduce the mayor's control of, the city council. The Court disagrees. Professor Simpson's conclusion that increased minority representation would weaken the mayor's position is based on the following suppositions: (1) that the remapping would impact the wards

of "three of the most Pro-administration aldermen" (*id.* at 9); (2) that three minorities would be elected in their places; and (3) that the newly elected minority aldermen would be unsympathetic to the Daley administration (*Id.*). There is no evidence, in Professor Simpson's report or elsewhere, to suggest that the confluence of these three events is inevitable or even likely. Absent such evidence, Professor Simpson's conclusion that increased minority representation would negatively impact the Daley administration is too speculative to support the inference that the City intentionally discriminated against plaintiffs to avoid it.

Plaintiffs also say that a pattern of discrimination exists from which intent can be inferred. As plaintiffs point out, the City not only paid the fees of the administration aldermen in these cases, but in five others as well: *Ketchum, Byrne, Ramos v. Chicago City Council*, which was consolidated with *PACI v. Daley*, and the two *Roti* cases. It is undisputed, however, that the administration aldermen were defendants in *Ketchum*, *Ramos* and *PACI*. *See*, *Ketchum*, 740 F.2d 1398, 1400 (7th Cir. 1984) ("Plaintiffs, including individual black and Hispanic residents of the City of Chicago, sued several individual defendants and the City Council of the City of Chicago alleging that the 1981 redistricting plan for the aldermanic wards of Chicago violated section 2 of the Voting Rights Act . . . ."); *Ramos*, No. 90 C 7211, Min. Order (ND. Ill. Jan. 8, 1991) (granting motion of various administration aldermen to intervene as defendants). That leaves the *Roti* cases. Though the administration aldermen were plaintiffs in those cases and the City paid their fees, two payments to aldermen-plaintiffs in the last twenty years is not a pattern of conduct from which an inference of discrimination can be drawn.

Finally, plaintiffs argue that Alderman Burke's statements to various plaintiffs that the Chicago Municipal Code authorized the payment of fees only to aldermen who were defendants, though he knew that the City had paid the fees of the aldermen-plaintiffs in *Roti I & II* evidences discriminatory intent. Plaintiffs, however, have told us little about the *Roti* cases. We determined, by comparing the caption of an opinion in *Roti II* to that in *Barnett*, that eleven of the twenty-four *Roti II* plaintiffs are administration aldermen. The parties agree that most of the administration aldermen are white, thus it is reasonable to assume that most of the eleven administration aldermen who were plaintiffs in *Roti II* are also white. The record does not, however, disclose the race of the thirteen other *Roti II* plaintiffs or that of the *Roti I* plaintiffs. Under the circumstances, Aldermen Burke's statements that the Chicago Municipal Code does not authorize payment of legal fees to plaintiffs, in the face of his knowledge about the payments to the *Roti* plaintiffs, do not support an inference of racial bias.[12]

They do, however, support the inference that he was biased against plaintiffs because of their opposition to the referendum map. There is no dispute that the City paid the

12. Because there is no other evidence of racial animus, the fact that most of the plaintiffs are black and most of the administration aldermen, and perhaps, the *Roti* plaintiffs, are white does not support an inference of racially discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) ("[Unless] a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face .... impact alone is not determinative.").

fees of the aldermen-plaintiffs in the *Roti* cases or that plaintiffs reminded Alderman Burke of that fact when they requested payment of their fees in the remap cases. (*See* Exs. Supp. Pls.' Mem. Law Opp'n Def.'s Renewed Mot. Summ. J., Tab B, No. 5, Pls.' Ex. 29, 2/12/93 Letter to Burke from Bloom.) Yet, Alderman Burke continued to maintain that there was no City ordinance that would allow payment of fees for aldermen who sue the City, (*See id.*, No. 7, Pls.' Ex. 30, 3/16/93 Letter to Bloom from Burke ("I have not found any language in the Municipal Code to authorize the Committee on Finance to pay the fees of outside lawyers hired to sue the City of Chicago, its officials and employees.").)

The City says that the two groups of aldermen-plaintiffs cannot be compared "given the difference in time, in City Council composition and in the desired goals of the respective litigations." (City of Chicago's Reply Br. Supp. Renewed Mot. Summ, J. at 10.) According to the City's interpretation of the fee payment ordinances, however, those differences are irrelevant. The sole factor that determines whether fees are paid, the City says, is whether an alderman sues or defends the City. Thus, plaintiffs here and those in the *Roti* cases are identical in the only respect that matters; they both sued the City.

The City's says that it treated the *Roti* plaintiffs more favorably than these plaintiffs because the former "sought declaratory judgments as to the validity of certain City Council resolutions and procedures" while that latter "were seeking judgments that members of the City Council engaged in intentional race discrimination when they voted for [the

referendum map]." (*Id.*) In other words, the City paid the *Roti* plaintiffs' fees because it found their claims less offensive than those asserted by plaintiffs in *Barnett*. That explanation — we only pay the legal fees of aldermen-plaintiffs if we deem the cause worthy — is virtually an admission that the City does not apply the fee payment ordinances in a content-neutral fashion. Given its contention that the ordinances forbid payments to plaintiffs, the City's payment of the *Roti* plaintiffs' fees suggests that its proffered reason for refusing to pay the remap plaintiffs' fees is a pretext for discrimination.

In short, plaintiffs have raised a genuine issue for trial on whether the City refused to pay their legal fees in the remap cases because of their opposition to the referendum map. The City's motion for summary judgment on plaintiffs' speech-based Fourteenth Amendment claims for present injunctive relief is, therefore, denied.

Conclusion

For the reasons set forth above, the following claims are dismissed without prejudice for lack of subject matter jurisdiction: (1) all plaintiffs' First Amendment claims; (2) all plaintiffs' Fourteenth Amendment claims for future injunctive relief; (3) all plaintiffs' Fourteenth Amendment claims for declaratory relief; and (4) the Fourteenth Amendment damage claims of all plaintiffs but Mr. Garcia. Moreover, there is no genuine issue of material fact on Mr. Garcia's Fourteenth Amendment damage claim or on all plaintiffs' race-based Fourteenth Amendment claims for present injunctive relief. The City's motion for summary

judgment on those claims is, therefore, granted, There are, however, genuine issues of material fact on all plaintiffs' speech-based Fourteenth Amendment claims for present injunctive relief, The City's motion for summary judgment on those claims is, therefore, denied. Finally, the City's motion to strike portions of plaintiffs' submissions is dismissed as moot.

ENTER:

s/ [illegible]
UNITED STATES DISTRICT JUDGE

DATED: July 31, 2002